

## 75 Am. Jur. 2d Trespass III A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Trespass

Eric C. Surette, J.D.

### III. Persons Liable

#### A. In General

[Topic Summary](#) | [Correlation Table](#)


## Research References

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  1, 30

### A.L.R. Library

A.L.R. Index, Trespass

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## 75 Am. Jur. 2d Trespass § 55

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### Trespass

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### III. Persons Liable

#### A. In General

## § 55. Definition of trespasser

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  1, 30

A trespasser is one who goes upon the property of another without the other's consent.<sup>1</sup> The definition of a trespasser stresses such factors as that the trespasser entered the property of another without any right, lawful authority, or express or implied invitation, permission, or license<sup>2</sup>—not for the performance of any duty to the person rightfully in possession, but merely for the trespasser's own purpose, pleasure, or convenience, or out of curiosity.<sup>3</sup> It has also been said that a trespasser is one who, without having title, makes entry upon land without the consent of the true owner.<sup>4</sup>

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### Footnotes

- 1 [In re IDC Clambakes, Inc.](#), 727 F.3d 58 (1st Cir. 2013) (applying Rhode Island law); [Spanish Lake Restoration, L.L.C. v. Petrodome St. Gabriel II, LLC](#), 186 So. 3d 230 (La. Ct. App. 4th Cir. 2016).
- 2 [Armstrong v. Bromley Quarry & Asphalt, Inc.](#), 305 Kan. 16, 378 P.3d 1090 (2016).
- 3 [Ragonese v. Racing Corp. of West Virginia](#), 234 W. Va. 706, 769 S.E.2d 495 (2015).
- 4 [Castano v. San Felipe Agricultural, Mfg., & Irr. Co.](#), 147 S.W.3d 444 (Tex. App. San Antonio 2004).

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## 75 Am. Jur. 2d Trespass § 56

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#### A. In General

## § 56. Particular persons as trespassers

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  30

Individual church members, who reentered church property after title reverted to the denomination after a schism, committed a trespass.<sup>1</sup> On the other hand, persons who were not trespassers included—

— a person on leased premises at the express invitation of the tenant.<sup>2</sup>

— a member of a property owners' association, who had the right to use common property.<sup>3</sup>

— prior owners who allegedly contaminated the property while they owned the land before selling it to the plaintiff, since they did not commit an unprivileged, intentional intrusion on land in possession of another,<sup>4</sup> although there is some authority that an action for a permanent trespass may be maintained against a prior owner of the same property in this situation.<sup>5</sup>

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### Footnotes

- 1 [St. Paul Church, Inc. v. Board of Trustees of Alaska Missionary Conference of United Methodist Church, Inc.](#), 145 P.3d 541 (Alaska 2006).
- 2 [Karow v. Student Inns, Inc.](#), 43 Ill. App. 3d 878, 2 Ill. Dec. 515, 357 N.E.2d 682, 98 A.L.R.3d 531 (4th Dist. 1976).
- 3 [Pine Knoll Association, Inc. v. Cardon](#), 126 N.C. App. 155, 484 S.E.2d 446 (1997).
- 4 [Sealy Connecticut, Inc. v. Litton Industries, Inc.](#), 989 F. Supp. 120 (D. Conn. 1997).
- 5 [Degussa Constr. Chem. Operations, Inc. v. Berwind Corp.](#), 280 F. Supp. 2d 393 (E.D. Pa. 2003) (applying Pennsylvania law).

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## 75 Am. Jur. 2d Trespass § 57

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### Trespass

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### III. Persons Liable

#### A. In General

## § 57. Persons liable for continuing trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  30

Aside from statutes imposing responsibility for certain environmental conditions, responsibility for a trespass that results in subsequently discovered damage depends on finding that a particular defendant caused the intrusion.<sup>1</sup> The particular defendant must be committing a continuing trespass.<sup>2</sup> Another consideration is whether a former owner has the ability to remediate the condition and stop the trespass.<sup>3</sup>

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### Footnotes

- <sup>1</sup> [Ronald Holland's A-Plus Transmission & Automotive, Inc. v. E-Z Mart Stores, Inc.](#), 184 S.W.3d 749 (Tex. App. San Antonio 2005).

The former owner of a gasoline station was not liable for trespass or under other theories for a discharge of gasoline from an underground storage tank, where there was no evidence of any intentional, reckless, or negligent act or omission on that person's part that arguably caused or contributed to the contamination of adjacent property. [Hilltop Nyack Corp. v. TRMI Holdings Inc.](#), 272 A.D.2d 521, 708 N.Y.S.2d 138 (2d Dep't 2000).

As to who may be sued in a private action relating to pollution, see [Am. Jur. 2d, Pollution Control](#) §§ 1907 to 1911.
- <sup>2</sup> [Oxford v. Williams Companies, Inc.](#), 137 F. Supp. 2d 756 (E.D. Tex. 2001) (applying Texas law).
- <sup>3</sup> [Briggs & Stratton Corp. v. Concrete Sales & Services, Inc.](#), 971 F. Supp. 566 (M.D. Ga. 1997), *aff'd*, 211 F.3d 1333 (11th Cir. 2000); [Rudd v. Electrolux Corp.](#), 982 F. Supp. 355 (M.D. N.C. 1997).

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## 75 Am. Jur. 2d Trespass III B Refs.

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III. Persons Liable

B. Multiple Persons Liable as Trespassers

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### Research References

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  30, 31

#### A.L.R. Library

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## 75 Am. Jur. 2d Trespass § 58

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### Trespass

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### III. Persons Liable

#### B. Multiple Persons Liable as Trespassers

## § 58. Multiple persons liable as trespassers, generally

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### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  30

A person may be liable for causing someone else to commit a trespass.<sup>1</sup> All persons who command, instigate, promote, encourage, advise, countenance, cooperate in, aid, or abet the commission of a trespass, or who approve of it after it is done, if done for their benefit, are cotrespassers with the person committing the trespass, and are liable as principals to the same extent and in the same manner as if they had performed the wrongful act themselves.<sup>2</sup> Thus, although entry is a requisite of a trespass, one is also liable for causing a third person to do so,<sup>3</sup> and a trespasser who did not personally and physically invade still may be liable for having caused or directed another person to trespass.<sup>4</sup>

There is no liability if a defendant did not have control over the trespasser's activities,<sup>5</sup> or did not order them.<sup>6</sup> One does not incur liability merely by doing business with a trespasser, without knowledge of the trespass.<sup>7</sup> For instance, granting a license to allow other companies to use one's telephone poles does not, by that act alone, make the licensor an aider or abettor to any subsequent trespass committed by the licensees.<sup>8</sup> Similarly, the supplier of a substance or object is not liable for a trespass committed by the purchaser, after the product has left the supplier's ownership and possession, and then invades neighboring land, so long as the delivery did not set a force into motion, which, in the usual course of events, would damage the property,<sup>9</sup> and the seller did not act in concert with the trespassing purchaser.<sup>10</sup>

One is not liable on a third-party trespass theory if the injury at issue is not harm to real property or to the owner's use and enjoyment of it.<sup>11</sup>

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Footnotes

- 1 [Liberty Place Retail Associates, L.P. v. Israelite School of Universal Practical Knowledge](#), 2014 PA Super 233, 102 A.3d 501 (2014).
- 2 [Causing someone else to trespass is a trespass. Martin v. Brown](#), 650 A.2d 937 (Me. 1994).
- 3 [Amoco Pipeline Co. v. Herman Drainage Systems, Inc.](#), 212 F. Supp. 2d 710 (W.D. Mich. 2002); [Oxford v. Williams Companies, Inc.](#), 137 F. Supp. 2d 756 (E.D. Tex. 2001); [Freese v. Buoy](#), 217 Ill. App. 3d 234, 160 Ill. Dec. 222, 576 N.E.2d 1176 (5th Dist. 1991).
- 4 [Liability for trespass is not dependent upon personal participation, and one who aids, assists, advises or gives encouragement to the actual trespasser, or concert and cooperation in the commission of a trespass, or subsequent ratification or adoption by one of an act of another for his or her benefit or in his or her interest is equally liable. Victory Energy Corporation v. Oz Gas Corporation](#), 461 S.W.3d 159 (Tex. App. El Paso 2014).
- 5 [§ 22.](#)
- 6 [Golonka v. Plaza at Latham LLC](#), 270 A.D.2d 667, 704 N.Y.S.2d 703 (3d Dep't 2000).
- 7 [A person may become liable for trespass to adjoining land without actually going upon that land by pointing out an erroneous division line between the tracts to a lumberman, who later cut trees on the adjoining land. Creel v. Crim](#), 812 So. 2d 1259 (Ala. Civ. App. 2001).
- 8 [A landowner directed a logging contractor to trespass on neighboring property and, thus, was liable for trespass, where the landowner designated the area from which the trees were to be cut, and directed the logger to cut trees on neighboring land. Gracey v. Van Camp](#), 299 A.D.2d 837, 750 N.Y.S.2d 400 (4th Dep't 2002).
- 9 [JBG/Twinbrook Metro Ltd. Partnership v. Wheeler](#), 346 Md. 601, 697 A.2d 898 (1997); [Whitfield Const. Co. v. Bank of Tokyo Trust Co.](#), 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 1999).
- 10 [Biomedical Innovations, Inc. v. McLaughlin](#), 103 Ohio App. 3d 122, 658 N.E.2d 1084 (10th Dist. Franklin County 1995).
- 11 [Oxford v. Williams Companies, Inc.](#), 137 F. Supp. 2d 756 (E.D. Tex. 2001).
- 12 [Dietz v. Illinois Bell Telephone Co.](#), 154 Ill. App. 3d 554, 107 Ill. Dec. 360, 507 N.E.2d 24 (1st Dist. 1987).
- 13 [Parks Hiway Enterprises, LLC v. CEM Leasing, Inc.](#), 995 P.2d 657, 40 U.C.C. Rep. Serv. 2d 678 (Alaska 2000).
- 14 [A railroad that had sold removed ties was not liable for trespass when the purchaser placed the ties on another's property after removing them from the right-of-way. River Valley Associates v. Consolidated Rail Corp.](#), 182 A.D.2d 974, 581 N.Y.S.2d 935 (3d Dep't 1992).
- 15 [Ward v. Northeast Texas Farmers Co-op. Elevator](#), 909 S.W.2d 143 (Tex. App. Texarkana 1995), writ denied, (Mar. 28, 1996) and (abrogated on other grounds by, [Environmental Processing Systems, L.C. v. FPL Farming Ltd.](#), 457 S.W.3d 414 (Tex. 2015)).
- 16 [Montgomery v. Remsburg](#), 147 Md. App. 564, 810 A.2d 14 (2002), judgment rev'd on other grounds, 376 Md. 568, 831 A.2d 18 (2003).

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## 75 Am. Jur. 2d Trespass § 59

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### Trespass

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### III. Persons Liable

#### B. Multiple Persons Liable as Trespassers

## § 59. Multiple trespassers as joint tortfeasors

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### West's Key Number Digest

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Cotrespassers are jointly and severally liable as joint tortfeasors, and may be sued either jointly or severally at the plaintiff's election.<sup>1</sup> To establish that a defendant is a joint tortfeasor in a trespass, it must be shown that the defendant proceeded tortiously, with intent or negligence.<sup>2</sup> There must be a sufficient nexus between one person's conduct and a codefendant's trespass for that person to be held responsible for the trespass as a joint tortfeasor.<sup>3</sup> Persons who do not actively participate in the commission of a trespass must do something by way of encouragement, advice, or suggestion that leads to the commission of the trespass, to render them liable as joint trespassers.<sup>4</sup> Thus, one who directs or authorizes a trespass is jointly and severally liable with the actual trespassers.<sup>5</sup>

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### Footnotes

- <sup>1</sup> U.S. v. Sullivan, 1 F.3d 1191 (11th Cir. 1993); Staples v. Hoefke, 189 Cal. App. 3d 1397, 235 Cal. Rptr. 165 (2d Dist. 1987); R & S Development, Inc. v. Wilson, 534 So. 2d 1008 (Miss. 1988); Standing Rock Homeowners Ass'n v. Misich, 106 Wash. App. 231, 23 P.3d 520 (Div. 3 2001).

A person who directs or assists in wrongfully causing waste or injury to the land of another may be held jointly and severally liable. Porter v. Kirkendoll, 421 P.3d 1036 (Wash. Ct. App. Div. 2 2018).

The imposition of joint and several liability for a trespass turns upon the actions of the joint trespassers as parties to the trespass, and personal participation is not required. Victory Energy Corporation v. Oz Gas Corporation, 461 S.W.3d 159 (Tex. App. El Paso 2014).

As to liability of joint tortfeasors, see Am. Jur. 2d, Torts §§ 64 to 74.
- <sup>2</sup> Staples v. Hoefke, 189 Cal. App. 3d 1397, 235 Cal. Rptr. 165 (2d Dist. 1987).
- <sup>3</sup> Staples v. Hoefke, 189 Cal. App. 3d 1397, 235 Cal. Rptr. 165 (2d Dist. 1987).

- 4 [Helsel v. Morcom, 219 Mich. App. 14, 555 N.W.2d 852 \(1996\).](#)
- 5 [Porter v. Kirkendoll, 421 P.3d 1036 \(Wash. Ct. App. Div. 2 2018\).](#)

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## 75 Am. Jur. 2d Trespass § 60

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### Trespass

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### III. Persons Liable

#### B. Multiple Persons Liable as Trespassers

## § 60. Ratification of trespass

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### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  30

In accordance with the rule that a person who approves of a trespass after it is done, if done for one's benefit, is liable,<sup>1</sup> an absent person may ratify the trespass and become liable as a principal,<sup>2</sup> even though the act was not done in obedience to that person's command or at that person's request.<sup>3</sup> To ratify a trespass, a person must either authorize or instruct the third party to do something, direct the third party's conduct, or accept the benefits of the trespass with full knowledge of its illegality.<sup>4</sup> The mere appropriation of the fruits of the trespass without knowledge is not sufficient.<sup>5</sup>

The ratification relates back to the date of the unauthorized act so as to constitute the principal a trespasser ab initio, or "from the beginning" of the act.<sup>6</sup>

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### Footnotes

- 1 § 58.
- 2 [Oxford v. Williams Companies, Inc.](#), 137 F. Supp. 2d 756 (E.D. Tex. 2001); [Bolinsky v. Fritz](#), 544 So. 2d 259 (Fla. 2d DCA 1989).
- 3 As to ratification of a trespass by an agent, see § 63.
- 4 [Bolinsky v. Fritz](#), 544 So. 2d 259 (Fla. 2d DCA 1989).
- 5 [W.E. Belcher Lumber Co. v. York](#), 245 Ala. 286, 17 So. 2d 281 (1944); [Bolinsky v. Fritz](#), 544 So. 2d 259 (Fla. 2d DCA 1989) (by implication); [Dietz v. Illinois Bell Telephone Co.](#), 154 Ill. App. 3d 554, 107 Ill. Dec. 360, 507 N.E.2d 24 (1st Dist. 1987) (by implication).
- 6 [W.E. Belcher Lumber Co. v. York](#), 245 Ala. 286, 17 So. 2d 281 (1944); [Bolinsky v. Fritz](#), 544 So. 2d 259 (Fla. 2d DCA 1989) (by implication).

6 [W.E. Belcher Lumber Co. v. York, 245 Ala. 286, 17 So. 2d 281 \(1944\).](#)

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## 75 Am. Jur. 2d Trespass III C Refs.

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### Trespass

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### III. Persons Liable

#### C. Vicarious Liability Based on Relationship to Trespasser

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### West's Key Number Digest

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### A.L.R. Library

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A.L.R. Index, Trespass

A.L.R. Index, Vicarious Liability

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## 75 Am. Jur. 2d Trespass § 61

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### Trespass

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### III. Persons Liable

#### C. Vicarious Liability Based on Relationship to Trespasser

## § 61. Liability of employer and employee as trespasser; independent contractors

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  30

A person may be liable for the trespass committed by another only if the alleged trespasser is employed, paid, or controlled by the party.<sup>1</sup> The employer's liability for a trespass committed by an employee is based upon the doctrine of respondeat superior.<sup>2</sup> The test of liability is whether the acts constituting the trespass were within the general scope of employment while engaged in the employer's business and were done with a view of furthering that business.<sup>3</sup> There must, of course, be evidence that the employee entered the plaintiff's property.<sup>4</sup>

The employee's knowledge and conduct may be imputed to the employer where the employee has notice that he or she is committing a trespass.<sup>5</sup>

The fact that a logger trespasses while working as an independent contractor for an adjoining landowner does not provide the adjoining landowner with an impenetrable shield for property owners are not protected from liability for a trespass committed by an independent contractor if they directed the trespass or such trespass was necessary to complete the contract.<sup>6</sup>

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### Footnotes

- <sup>1</sup> [Jersey City Redevelopment Authority v. PPG Industries](#), 655 F. Supp. 1257 (D.N.J. 1987).  
Since drivers employed by carriers who delivered a supplier's products were under the carrier's control, the supplier was not liable for trespass on the property of an adjoining owner who alleged that the trucks blocked a common driveway. [Gittemeier v. Contractors Roofing & Supply Co.](#), 932 S.W.2d 865 (Mo. Ct. App. E.D. 1996).
- <sup>2</sup> [Lockhart v. Friendly Finance Co.](#), 110 So. 2d 478 (Fla. 1st DCA 1959).

As to an employer's liability for the wrongs of employees to third persons under the doctrine of respondeat superior, generally, see [Am. Jur. 2d, Employment Relationship § 356](#).

3      [Lockhart v. Friendly Finance Co.](#), 110 So. 2d 478 (Fla. 1st DCA 1959); [Waler v. Great Northern Ry. Co.](#), 22 S.D. 256, 117 N.W. 140 (1908).

A company that alleged that its former employee entered onto its premises did not establish a trespass case against competitors for whom the trespasser now worked, where there was no evidence that the competitors caused the employee to enter the plaintiff's premises or were otherwise intentionally connected to the employee's alleged wrongful entry. [Biomedical Innovations, Inc. v. McLaughlin](#), 103 Ohio App. 3d 122, 658 N.E.2d 1084 (10th Dist. Franklin County 1995).

4      [American Broadcasting Companies, Inc. v. Gill](#), 6 S.W.3d 19 (Tex. App. San Antonio 1999) (disapproved of on other grounds by, [Turner v. KTRK Television, Inc.](#), 38 S.W.3d 103 (Tex. 2000)).

5      [Ingram v. Summerlin](#), 179 Ga. App. 832, 348 S.E.2d 68 (1986); [R & S Development, Inc. v. Wilson](#), 534 So. 2d 1008 (Miss. 1988).

6      [Jones v. Castlerick, LLC](#), 128 A.D.3d 1153, 8 N.Y.S.3d 727 (3d Dep't 2015).

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## 75 Am. Jur. 2d Trespass § 62

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### Trespass

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### III. Persons Liable

#### C. Vicarious Liability Based on Relationship to Trespasser

## § 62. Liability of business entities and associated persons as trespasser

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### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  30

A corporation may be held liable for a trespass committed by its officers or agents, in the course of their employment.<sup>1</sup> However, a company may not be held liable for trespasses done by its owner for the owner's own benefit, not that of the company.<sup>2</sup> A close family relationship with the owners of a business is not sufficient to impose vicarious liability on the relatives for trespass.<sup>3</sup>

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### Footnotes

- 1 [Russell v. American Rock Crusher Co.](#), 181 Kan. 891, 317 P.2d 847 (1957).  
As to the liability of corporations, and the role of respondeat superior, generally, see [Am. Jur. 2d, Corporations](#) § 1812.
- 2 [Pearl Investments, LLC v. Standard I/O, Inc.](#), 257 F. Supp. 2d 326, 50 U.C.C. Rep. Serv. 2d 377 (D. Me. 2003) (alleged trespass to chattels).
- 3 [Nance v. Miami Sand & Gravel, LLC](#), 825 N.E.2d 826 (Ind. Ct. App. 2005).

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## 75 Am. Jur. 2d Trespass § 63

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#### C. Vicarious Liability Based on Relationship to Trespasser

## § 63. Liability of principal and agent as trespasser

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  30

A principal can be liable for the trespass of an agent.<sup>1</sup> Where an agent commits a trespass, a principal, after being fully informed of the trespass, may adopt it, and the ratification ordinarily binds the principal to the same extent as if the principal had originally authorized it,<sup>2</sup> if the principal ratified the agent's wrongful act with a full knowledge of its tortious character.<sup>3</sup>

### Comment:

An agent who assists another agent or the principal to commit a trespass is normally liable as a joint tortfeasor for the entire damage, except where good faith creates a privilege to act.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Fischer v. Croston](#), 163 Idaho 331, 413 P.3d 731 (2018).
- <sup>2</sup> [W.E. Belcher Lumber Co. v. York](#), 245 Ala. 286, 17 So. 2d 281 (1944).
- <sup>3</sup> [W.E. Belcher Lumber Co. v. York](#), 245 Ala. 286, 17 So. 2d 281 (1944).

A wife was not liable for a trespass resulting from her husband being primarily responsible for building a seawall on their property, which extended a couple feet onto the adjoining property, blocking a drainage ditch, where there is no evidence that he informed her of the neighbor's objection. [Bolinsky v. Fritz, 544 So. 2d 259 \(Fla. 2d DCA 1989\)](#).

4 [Restatement Second, Agency § 343](#), comment d.

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## 75 Am. Jur. 2d Trespass IV A Refs.

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#### IV. Defenses

##### A. Overview

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## 75 Am. Jur. 2d Trespass § 64

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#### IV. Defenses

##### A. Overview

## § 64. Defenses to trespass, generally

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### Forms

[Am. Jur. Pleading and Practice Forms, Trespass § 82](#) (Answer—Defense—Reliance on survey)

[Am. Jur. Pleading and Practice Forms, Trespass § 85](#) (Answer—Defense—In mitigation of damages—Defendant's good-faith belief in rightfulness of his or her acts)

As an affirmative defense to a trespass claim, a defendant may assert that its entry onto the plaintiff's land was lawful or under legal right,<sup>1</sup> as such an entry does not constitute a trespass.<sup>2</sup> However, since the intent with which an act is done is not a test of liability in trespass,<sup>3</sup> neither a mistake of law or fact<sup>4</sup> nor the absence of bad faith on the part of the defendant will excuse a trespass.<sup>5</sup> Likewise, reasonableness on the part of the defendant is not a defense to trespass liability.<sup>6</sup> Ignorance does not excuse an entry upon the land of another;<sup>7</sup> thus, one may not defend a trespass by showing lack of knowledge of the location of the boundary lines,<sup>8</sup> even when the owner has failed to mark them.<sup>9</sup> The defendant's subjective reasons for being on the property, not related to a claimed property right or permission, are irrelevant to the issue of a claim of right in an action for trespass<sup>10</sup> nor is it a defense to an action for damages in trespass that the trespasser has possessed the property for a year.<sup>11</sup>

While the fact that the subject matter has been adjudicated in another action is a bar to a subsequent suit in trespass,<sup>12</sup> separate suits may be brought for successive trespasses.<sup>13</sup>

A statute setting out a standard by which a property may be deemed "posted" for the purposes of determining whether a defendant may be found guilty of criminal trespass for knowingly entering property, or if the elevated mens rea requirement must be proven, does not provide an affirmative defense to common law claims for trespass.<sup>14</sup>

An entity that commits a trespass cannot later seek condemnation and use the condemnation as a defense to a claim for damages based on its prior trespass.<sup>15</sup>

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#### Footnotes

- 1 [Steele v. Bowden](#), 238 N.C. App. 566, 768 S.E.2d 47 (2014).
- 2 [Tennant v. Chase Home Finance, LLC](#), 187 So. 3d 1172 (Ala. Civ. App. 2015).
- 3 [§ 9](#).
- 4 [§ 11](#).
- 5 [Poggi v. Scott](#), 167 Cal. 372, 139 P. 815 (1914); [Gordon Creek Tree Farms, Inc. v. Layne](#), 230 Or. 204, 368 P.2d 737 (1962); [Schultz v. Frankfort Marine, Acc. & Plate Glass Ins. Co.](#), 152 Wis. 537, 139 N.W. 386 (1913).
- 6 [Johnson v. Paynesville Farmers Union Co-op. Oil Co.](#), 817 N.W.2d 693 (Minn. 2012).
- 7 [§ 11](#).
- 8 [Boulton v. Telfer](#), 52 Idaho 185, 12 P.2d 767, 83 A.L.R. 1341 (1932); [J.F. Ball & Bro. Lumber Co. v. Simms Lumber Co.](#), 121 La. 627, 46 So. 674 (1908).
- 9 [Cosgriff v. Miller](#), 10 Wyo. 190, 68 P. 206 (1902).
- 10 [State v. Scholberg](#), 395 N.W.2d 454 (Minn. Ct. App. 1986).
- 11 [Owens v. Smith](#), 541 So. 2d 950 (La. Ct. App. 2d Cir. 1989).
- 12 [Rollins v. Blackden](#), 112 Me. 459, 92 A. 521 (1914).
- 13 [§ 93](#).
- 14 [Holcomb v. Rodriguez](#), 2016-NMCA-075, 387 P.3d 286 (N.M. Ct. App. 2016), cert. denied, (Aug. 18, 2016).
- 15 [Relaxation, Inc. v. RIS, Inc.](#), 452 S.W.3d 743 (Mo. Ct. App. W.D. 2015).

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## 75 Am. Jur. 2d Trespass § 65

American Jurisprudence, Second Edition | May 2021 Update

### Trespass

Eric C. Surette, J.D.

#### IV. Defenses

##### A. Overview

## § 65. Title and right to possession as defense to trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  27

Ownership, together with a right of possession, is a defense to liability for a trespass.<sup>1</sup> Although the gist of an action for trespass is a violation of possession, and not a challenge to title,<sup>2</sup> a defendant in a trespass action may dispute a plaintiff's possessory right by showing title and a possessory right.<sup>3</sup> Even one who holds property under a colorable claim of ownership is not subject to a trespass action by the true owner.<sup>4</sup> Thus, a claim that the defendant was a bona fide purchaser for value without notice is an affirmative defense in a civil action for trespass.<sup>5</sup>

After-acquired title may preclude liability for trespass.<sup>6</sup> Despite the extinction of a lease, one who remains as a tenant at sufferance does not become a trespasser.<sup>7</sup>

Title in a third person may not be alleged by a defendant who is not in privity of title with the third person.<sup>8</sup> Similarly, since, as against one in possession, an intruder must justify the invasion by virtue of one's own title, and not by the weakness of the plaintiff's, the fact that the plaintiff's title was defective is not a defense to liability in trespass.<sup>9</sup>

When materials are left on real property at the conclusion of the defendant's lawful possession of the property, there is no cause of action in trespass if the materials entered the land before or during the defendant's lawful possession.<sup>10</sup>

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#### Footnotes

1 Lambert v. Rainbolt, 1952 OK 412, 207 Okla. 451, 250 P.2d 459 (1952); Thomsen v. State, 70 Wash. 2d  
2 92, 422 P.2d 824 (1966).  
3 § 2.  
4 Jaycox v. E.M. Harris Bldg. Co., 754 S.W.2d 931 (Mo. Ct. App. E.D. 1988).  
5 Akers v. D.L. White Const., Inc., 156 Idaho 37, 320 P.3d 428 (2014).  
6 Wicker v. Harvey, 937 So. 2d 983 (Miss. Ct. App. 2006).  
7 Butler v. City of Eupora, 725 So. 2d 158 (Miss. 1998).  
8 Federal Home Loan Mortg. Corp. v. Van Sickle, 52 Conn. App. 37, 726 A.2d 600 (1999).  
9 Vidmer v. Lloyd, 193 Ala. 386, 69 So. 480 (1915); Thomsen v. State, 70 Wash. 2d 92, 422 P.2d 824 (1966).  
10 Beardslee v. New Berlin Light & Power Co., 207 N.Y. 34, 100 N.E. 434 (1912); Thomsen v. State, 70 Wash.  
2d 92, 422 P.2d 824 (1966).  
Hanna v. ARE Acquisitions, LLC, 400 Md. 650, 929 A.2d 892 (2007).

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## 75 Am. Jur. 2d Trespass § 66

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### Trespass

Eric C. Surette, J.D.

#### IV. Defenses

##### A. Overview

### § 66. Possession under easement as defense to trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  27

Since the essence of trespass is the invasion of a person's interest in the exclusive possession of land,<sup>1</sup> the action may not be maintained where the person has acquired an easement over the land in question.<sup>2</sup> However, this general principle is true only when the scope of the easement has not been exceeded.<sup>3</sup> The holder of an easement commits a trespass by exceeding one's rights under the easement,<sup>4</sup> such as by misuse or deviating from an existing easement,<sup>5</sup> to the extent of the unauthorized use.<sup>6</sup> If the easement is limited in scope or purpose, the easement holder becomes a trespasser by misusing or exceeding the extent of the easement.<sup>7</sup>

The existence of an easement does not justify an entry by a trespassing third party.<sup>8</sup>

An easement's dominant estate could not state a cause of action against the servient estate for trespassing regarding the easement as a matter of law after the servient estate allegedly erected a chain and pole to impede the dominant estate's passage, where the servient estate owned the easement property and the dominant estate's easement did not give a possessory right, not to mention an exclusive possessory right, in that property.<sup>9</sup>

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#### Footnotes

<sup>1</sup> § 20.

<sup>2</sup> [Simcox v. Hunt](#), 874 So. 2d 1010 (Miss. Ct. App. 2004); [Patel v. Garden Homes Management Corp.](#), 156 A.D.3d 807, 68 N.Y.S.3d 87 (2d Dep't 2017); [Mason v. Town of Fletcher](#), 149 N.C. App. 636, 561 S.E.2d 524 (2002) (water line installed within right-of-way).



Use of a common driveway pursuant to an easement is not a trespass. [Krosky v. Hatgipetros](#), 150 A.D.2d 344, 541 N.Y.S.2d 22 (2d Dep't 1989).

Utility and tree removal companies did not commit trespass by cutting trees, where, according to the terms of a judgment in a previous condemnation case, the utility company had the right to remove "danger trees" outside the right-of-way and trees to reach the danger trees and to provide escape routes. [Lacy v. Alabama Power Co.](#), 779 So. 2d 1184 (Ala. 2000).

[Julia Properties, LLC v. Levy](#), 137 A.D.3d 1224, 28 N.Y.S.3d 428 (2d Dep't 2016).

[Tice v. Herring](#), 717 So. 2d 181 (Fla. 1st DCA 1998); [Schadewald v. Brule](#), 225 Mich. App. 26, 570 N.W.2d 788 (1997); [Reinbott v. Tidwell](#), 191 S.W.3d 102 (Mo. Ct. App. S.D. 2006).

[Olympic Pipe Line Co. v. Thoeny](#), 124 Wash. App. 381, 101 P.3d 430 (Div. 2 2004).

Persons who had a roadway easement across adjacent property, but had used a portion of the property outside the easement, had trespassed. [Apel v. Katz](#), 83 Ohio St. 3d 11, 1998-Ohio-420, 697 N.E.2d 600 (1998).

[Reinbott v. Tidwell](#), 191 S.W.3d 102 (Mo. Ct. App. S.D. 2006).

[Hammond v. SBC Communications, Inc.](#), 365 Ill. App. 3d 879, 302 Ill. Dec. 828, 850 N.E.2d 265 (1st Dist. 2006) (overruled on other grounds by, [Vision Point of Sale, Inc. v. Haas](#), 226 Ill. 2d 334, 314 Ill. Dec. 778, 875 N.E.2d 1065 (2007)).

The scope of a roadway easement was limited to the right of ingress and egress enjoyed by the public, and could not be expanded to include the installation of a sewer line, resulting in a trespass. [Moore v. Leveris](#), 128 N.C. App. 276, 495 S.E.2d 153 (1998).

Planting trees on an area for a roadway easement was a trespass, since this was inconsistent with the use of the property for a roadway. [Conner v. Lucas By and Through Lucas](#), 141 Or. App. 531, 920 P.2d 171 (1996).

[Tusa v. Cablevision](#), 262 A.D.2d 306, 691 N.Y.S.2d 105 (2d Dep't 1999); [Frank v. Mayberry](#), 1999 OK 63, 985 P.2d 773 (Okla. 1999); [Gleason v. Taub](#), 180 S.W.3d 711 (Tex. App. Fort Worth 2005).

[McBride v. Smith](#), 18 Cal. App. 5th 1160, 227 Cal. Rptr. 3d 390 (1st Dist. 2018).

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## 75 Am. Jur. 2d Trespass § 67

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### Trespass

Eric C. Surette, J.D.

#### IV. Defenses

##### A. Overview

### § 67. Plaintiff's fault or assumption of risk as defense to trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  23

The plaintiffs' culpable conduct is not a defense to trespass.<sup>1</sup> Contributory negligence is not a proper defense to trespass,<sup>2</sup> although it is a factor in determining whether an actor was privileged to enter land to reclaim a chattel.<sup>3</sup> Assumption of risk is also not a defense to a nonnegligent trespass.<sup>4</sup>

#### Observation:

The result may be affected where the trespass is negligent,<sup>5</sup> and by comparative negligence.<sup>6</sup>

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#### Footnotes

- <sup>1</sup> [Ligo v. Gerould](#), 244 A.D.2d 852, 665 N.Y.S.2d 223 (4th Dep't 1997) (contention that plaintiff previously trespassed on defendant's property not relevant).
- <sup>2</sup> [Smith v. McCullough Dredging Co.](#), 152 So. 2d 194 (Fla. 3d DCA 1963).
- <sup>3</sup> § 84.

- 4 JBG/Twinbrook Metro Ltd. Partnership v. Wheeler, 346 Md. 601, 697 A.2d 898 (1997).  
5 As to a trespass resulting from negligence, see § 12.  
6 As to the applicability of comparative fault to intentional torts, see [Am. Jur. 2d, Negligence § 979](#).  
As to the effect of comparative negligence on assumption of risk, see [Am. Jur. 2d, Negligence §§ 1002 to 1005](#).

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## 75 Am. Jur. 2d Trespass § 68

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### Trespass

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#### IV. Defenses

##### A. Overview

## § 68. Infancy as defense to trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  23

As in the case of other torts,<sup>1</sup> infancy is not a defense to liability in trespass.<sup>2</sup>

### Reminder:

It is still necessary to determine whether a child formed the intent to commit the act alleged to be a trespass.<sup>3</sup>

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### Footnotes

- <sup>1</sup> [Am. Jur. 2d, Infants § 116.](#)
- <sup>2</sup> [Farm Bureau Mut. Ins. Co. of Arkansas, Inc. v. Henley](#), 275 Ark. 122, 628 S.W.2d 301 (1982); [Cleveland Park Club v. Perry](#), 165 A.2d 485 (Mun. Ct. App. D.C. 1960); [Fett v. Sligo Hills Development Corp.](#), 226 Md. 190, 172 A.2d 511 (1961); [Brown v. Dellinger](#), 355 S.W.2d 742 (Tex. Civ. App. Texarkana 1962), writ refused n.r.e., (June 20, 1962).
- <sup>3</sup> [§ 9.](#)

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## 75 Am. Jur. 2d Trespass § 69

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### Trespass

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#### IV. Defenses

##### A. Overview

## § 69. Laches or limitations as defense to trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  23, 35

### Forms

[Am. Jur. Pleading and Practice Forms, Trespass § 78](#) (Answer—Defense—Action barred by statute of limitations)

Since a trespass action is an action at law, laches is not a proper defense.<sup>1</sup>

The statute of limitations may be pleaded as an affirmative defense to an action alleging a trespass<sup>2</sup> or a continuing trespass.<sup>3</sup> The burden is on the defendant to show entitlement to the limitations defense and that the defense is meritorious.<sup>4</sup>

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#### Footnotes

- <sup>1</sup> [MacWillie v. Southeast Alabama Gas Dist.](#), 539 So. 2d 245 (Ala. 1989).
- <sup>2</sup> [MacWillie v. Southeast Alabama Gas Dist.](#), 539 So. 2d 245 (Ala. 1989).  
As to applicability of statutes of limitations to trespass actions, generally, see [§ 176](#).  
As to pleading affirmative defenses, generally, including the statute of limitations in a trespass action, see [§ 186](#).
- <sup>3</sup> [Wimmer v. City of Ft. Thomas](#), 733 S.W.2d 759 (Ky. Ct. App. 1987); [Elk Garden Big Vein Coal Min. Co. v. Gerstell](#), 95 W. Va. 471, 121 S.E. 569, 33 A.L.R. 298 (1924).

4 [Wimmer v. City of Ft. Thomas, 733 S.W.2d 759 \(Ky. Ct. App. 1987\).](#)

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## 75 Am. Jur. 2d Trespass § 70

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### Trespass

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#### IV. Defenses

##### A. Overview

## § 70. Estoppel as defense to trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  23

The doctrine of estoppel may be raised in defense to an action for trespass.<sup>1</sup> Equitable estoppel arises, in a trespass action, when an individual, by acts, representations, admissions, or by silence when there is a duty to speak, intentionally or through culpable negligence, induces another to believe that certain facts exist, and the other person rightfully relies and acts upon that belief to his or her detriment.<sup>2</sup> Reliance is a requisite to estoppel as a defense to trespass,<sup>3</sup> and therefore a failure to object to another's encroachment on one's soil or rights, equally well known or equally open to the notice of both parties, will not operate as an estoppel.<sup>4</sup> Mere prolonged occupation by a limited licensee, who made improvements to the property,<sup>5</sup> or a trespasser on the land of another with the latter's knowledge,<sup>6</sup> if not giving rise to adverse possession, will not estop the true owner from maintaining a trespass action.

One is estopped to maintain an action for a trespass to which he or she has consented.<sup>7</sup> However, a landowner is not equitably estopped, in an action for trespass, from revoking a license granted for a specified purpose, notwithstanding improvements made on the property by the licensee, where the parties fully manifested an intent to limit the duration of the right of passage.<sup>8</sup>

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#### Footnotes

<sup>1</sup> [Merrill Stevens Dry Dock Co. v. G & J Investments Corp., Inc.](#), 506 So. 2d 30 (Fla. 3d DCA 1987); [Steel Creek Development Corp. v. Smith](#), 300 N.C. 631, 268 S.E.2d 205 (1980).

<sup>2</sup> [Steel Creek Development Corp. v. Smith](#), 300 N.C. 631, 268 S.E.2d 205 (1980).

Landowners who knowingly agreed with a developer regarding the placement of a golf course fairway adjacent to their property were charged with common knowledge that golfers do not always hit their golf balls straight, giving rise to an equitable estoppel defense to claims of intentional trespass based on errant



golf balls hit onto their property; also, the developer did not realize as much from the sale of its property by placing a golf course, rather than residences, adjacent to the plaintiffs' property. [Geddes v. Mill Creek Country Club, Inc.](#), 196 Ill. 2d 302, 256 Ill. Dec. 313, 751 N.E.2d 1150 (2001).

3 [Storey v. Patterson](#), 437 So. 2d 491 (Ala. 1983).

4 [Cityco Realty Co. v. Slaysman](#), 160 Md. 357, 153 A. 278, 76 A.L.R. 296 (1931).

5 [Merrill Stevens Dry Dock Co. v. G & J Investments Corp., Inc.](#), 506 So. 2d 30 (Fla. 3d DCA 1987).

6 [Woll v. Voigt](#), 105 Minn. 371, 117 N.W. 608 (1908).

7 [Rogers v. Portland & B. St. Ry.](#), 100 Me. 86, 60 A. 713 (1905).

8 [Merrill Stevens Dry Dock Co. v. G & J Investments Corp., Inc.](#), 506 So. 2d 30 (Fla. 3d DCA 1987).

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## 75 Am. Jur. 2d Trespass IV B Refs.

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### Trespass

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#### IV. Defenses

##### B. Privilege

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## Research References

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  23 to 26

### A.L.R. Library

A.L.R. Index, Trespass

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## 75 Am. Jur. 2d Trespass § 71

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### Trespass

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#### IV. Defenses

##### B. Privilege

###### 1. In General

### § 71. Privilege as defense to trespass, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  23

Conduct that would otherwise constitute a trespass is not a trespass if it is privileged.<sup>1</sup> Such a privilege may be derived from the consent of the possessor, or may be given by law because of the purpose for which the actor acts or refrains from acting.<sup>2</sup> Privilege is the distinguishing characteristic between lawful trespass and an unlawful presence on the land or premises of another, as where no privilege exists, entry constitutes trespass.<sup>3</sup> Irrespective of any transaction between the parties, privileges may arise such as the privilege to enter to abate a nuisance, to act out of necessity, or to reclaim or remove a chattel on the property.<sup>4</sup>

If a privilege to enter the real property of another is defined in terms of reasonableness, a trespass may occur only when the holder of the privilege acts unreasonably or unnecessarily.<sup>5</sup>

The public trust doctrine<sup>6</sup> does not give the public the right to cross the land of another without permission for the purpose of gaining access to bodies of water to exercise public trust rights, and doing so constitutes trespass.<sup>7</sup>

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#### Footnotes

- 1 [Case v. St. Mary's Bank](#), 164 N.H. 649, 63 A.3d 1209 (2013); [Mueller v. Allen](#), 2005 UT App 477, 128 P.3d 18 (Utah Ct. App. 2005).  
[Restatement Second, Torts § 158](#), comment e.
- 2 [Case v. St. Mary's Bank](#), 164 N.H. 649, 63 A.3d 1209 (2013).
- 3 [State v. Carradine](#), 2015-Ohio-3670, 38 N.E.3d 936 (Ohio Ct. App. 8th Dist. Cuyahoga County 2015).

- 4                    [Restatement Second, Torts §§ 196 to 203.](#)
- 5                    [Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913 \(Colo. 1997\)](#), as modified on denial of reh'g, (Oct. 20, 1997).
- As to this being the standard when a possessor is privileged to remove a chattel from the land, see [§ 88](#).
- 6                    [Am. Jur. 2d, Waters § 4.](#)
- 7                    [Sheftel v. Lebel, 44 Mass. App. Ct. 175, 689 N.E.2d 500 \(1998\).](#)

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## 75 Am. Jur. 2d Trespass § 72

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### Trespass

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#### IV. Defenses

##### B. Privilege

##### 1. In General

## § 72. Necessity as defense to trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  26

### Forms

[Am. Jur. Pleading and Practice Forms, Trespass § 79](#) (Answer—Defense—Necessity—Impassable highway)

[Am. Jur. Pleading and Practice Forms, Trespass § 83](#) (Answer—Defense—Acts by defendant to preserve property)

[Am. Jur. Pleading and Practice Forms, Trespass § 84](#) (Answer—Defense—Entry onto plaintiffs' property was necessary to prevent serious harm to the land)

Under the law of torts, the defense of necessity allows an individual to enter and remain on another's property without permission in an emergency situation when such entry is reasonably necessary to prevent serious harm, even as to a third person, and the privilege must be exercised at a reasonable time and in a reasonable manner.<sup>1</sup> One is similarly privileged to enter land if the actor reasonably believes it is necessary for the purpose of averting an imminent public disaster.<sup>2</sup> However, if the entry is for the benefit of the actor or a third person, the actor is subject to liability for any harm done in the exercise of the privilege.<sup>3</sup> Substantially the same rules apply with respect to trespass to chattels.<sup>4</sup>

The doctrine of necessity may apply in such situations as where one must moor a boat on another's property to avoid a severe storm, in order to preserve the lives and property on board.<sup>5</sup>

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Footnotes

- 1 [City of Des Moines v. Webster](#), 861 N.W.2d 878 (Iowa Ct. App. 2014) (adopting [Restatement Second, Torts § 197](#)); [Saidi v. U.S.](#), 110 A.3d 606 (D.C. 2015).  
Police officers clearly had license to enter a home to render aid to the homeowners' son who had possibly overdosed, and thus the officers' entry into the home did not constitute trespass under Massachusetts law. [Hill v. Walsh](#), 884 F.3d 16 (1st Cir. 2018).
- 2 [Restatement Second, Torts § 196](#).
- 3 [Restatement Second, Torts § 197\(2\)](#).
- 4 [Restatement Second, Torts §§ 262, 263](#).
- 5 [Buffalo Marine Service, Inc. v. Monteau](#), 761 S.W.2d 416 (Tex. App. Houston 14th Dist. 1988); [Ploof v. Putnam](#), 81 Vt. 471, 71 A. 188 (1908).

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## 75 Am. Jur. 2d Trespass § 73

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### Trespass

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#### IV. Defenses

##### B. Privilege

###### 1. In General

### § 73. Entry to abate nuisance as defense to trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  23

An entry on land in the possession of another by a possessor of neighboring land is privileged if the entry is made for the purpose of abating a structure or other condition on the land, which constitutes a private nuisance to the actor's possessory interest in his or her land, at a reasonable time and in a reasonable manner, and after the person maintaining the nuisance, upon demand, has failed to abate it, or without a demand if the actor reasonably believes that a demand would be impractical or useless.<sup>1</sup> One to whom a public nuisance causes or threatens special harm is privileged to abate it under the same conditions as a private nuisance.<sup>2</sup>

A public officer who is authorized to abate a public nuisance is privileged, at a reasonable time and in a reasonable manner, to enter land in the possession of another for the purpose of abating it.<sup>3</sup>

One is privileged to commit an act that would otherwise be a trespass to the chattel of another, for the purpose of abating a private nuisance, if the act is a reasonable means of abating the nuisance, and a demand to abate it was unsuccessful or would be futile.<sup>4</sup>

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#### Footnotes

- <sup>1</sup> [Restatement Second, Torts § 201.](#)
- <sup>2</sup> [Restatement Second, Torts § 264\(2\).](#)
- <sup>3</sup> [Restatement Second, Torts § 202.](#)
- <sup>4</sup> [Restatement Second, Torts § 264\(1\).](#)

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## 75 Am. Jur. 2d Trespass § 74

American Jurisprudence, Second Edition | May 2021 Update

### Trespass

Eric C. Surette, J.D.

#### IV. Defenses

##### B. Privilege

##### 2. Consent or License

### § 74. Consent or license as defense to trespass, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  25

#### Forms

[Am. Jur. Pleading and Practice Forms, Easements and Licenses § 98](#) (Answer—Defense—To trespass action—Entry and acts done under license)

A claim for trespass depends upon the consent of the owner,<sup>1</sup> as lack of consent is an element of the theory underlying the tort.<sup>2</sup> Thus, the owner's permission or license may be a defense to trespass.<sup>3</sup> An entry is privileged to the extent it is pursuant to the possessor's consent.<sup>4</sup> Consent or a license from the owner of land is an absolute or complete<sup>5</sup> defense to a trespass action,<sup>6</sup> for acts done within its scope.<sup>7</sup> It has similarly been said that one who possesses a license is not a trespasser.<sup>8</sup>

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#### Footnotes

<sup>1</sup> [Roman Catholic Archbishop of Boston v. Rogers](#), 88 Mass. App. Ct. 519, 39 N.E.3d 736 (2015), cert. denied, 136 S. Ct. 2013, 195 L. Ed. 2d 216 (2016).

- 2 Church of Christ in Hollywood v. Superior Court, 99 Cal. App. 4th 1244, 121 Cal. Rptr. 2d 810 (2d Dist. 2002); Mitchell v. Baltimore Sun Co., 164 Md. App. 497, 883 A.2d 1008 (2005); Environmental Processing Systems, L.C. v. FPL Farming Ltd., 457 S.W.3d 414 (Tex. 2015).  
Consent may not be found, where adjoining owners stated that they did not want a contractor excavating on their property. Knaus v. Dennler, 170 Ill. App. 3d 746, 121 Ill. Dec. 401, 525 N.E.2d 207 (5th Dist. 1988).
- 3 Main Street Holding Inc. v. Omsiv Inc., 203 So. 3d 668 (Miss. Ct. App. 2016).
- 4 Rawls & Associates v. Hurst, 144 N.C. App. 286, 550 S.E.2d 219 (2001); Mueller v. Allen, 2005 UT App 477, 128 P.3d 18 (Utah Ct. App. 2005).
- 5 Mitchell v. Baltimore Sun Co., 164 Md. App. 497, 883 A.2d 1008 (2005); O'Brien v. Ginter, 296 A.D.2d 387, 744 N.Y.S.2d 511 (2d Dep't 2002).  
No trespass occurs when the entry is authorized, as a matter of law. Williams v. City of Dallas, 53 S.W.3d 780 (Tex. App. Dallas 2001).
- 6 McCaig v. Talladega Pub. Co., Inc., 544 So. 2d 875 (Ala. 1989); Matanuska Elec. Ass'n, Inc. v. Weissler, 723 P.2d 600 (Alaska 1986); American Transmission, Inc. v. Channel 7 of Detroit, Inc., 239 Mich. App. 695, 609 N.W.2d 607 (2000); United Food and Commercial Workers Intern. Union v. Wal-Mart Stores, Inc., 430 S.W.3d 508 (Tex. App. Fort Worth 2014).
- 7 § 77.
- 8 Seven Lakes Development Co., L.L.C. v. Maxson, 2006 WY 136, 144 P.3d 1239 (Wyo. 2006).

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## 75 Am. Jur. 2d Trespass § 75

American Jurisprudence, Second Edition | May 2021 Update

### Trespass

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#### IV. Defenses

##### B. Privilege

##### 2. Consent or License

## § 75. Who may consent to trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  25

Consent, to be a valid defense to an action for trespass, must be granted by one in possession,<sup>1</sup> one entitled to possession of the premises,<sup>2</sup> one acting with the owner's or rightful possessor's authority,<sup>3</sup> or one otherwise competent and authorized to give consent.<sup>4</sup> One owner's permission may be sufficient.<sup>5</sup> A recorded license agreement with an owner is binding on subsequent purchasers of the property, so as to preclude the purchasers from maintaining a trespass claim.<sup>6</sup>

Acquiring a permit from the state is not sufficient to relieve a tortfeasor from his or her potential liability to a private property's owner.<sup>7</sup>

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#### Footnotes

- 1 [Dubuque Fire & Marine Ins. Co. v. Union Compress & Warehouse Co.](#), 143 F. Supp. 128 (W.D. La. 1956); [Belluomo v. KAKE TV & Radio, Inc.](#), 3 Kan. App. 2d 461, 596 P.2d 832 (1979); [Maryland Tel. & Tel. Co. v. Ruth](#), 106 Md. 644, 68 A. 358 (1907).
- 2 [Dubuque Fire & Marine Ins. Co. v. Union Compress & Warehouse Co.](#), 143 F. Supp. 128 (W.D. La. 1956); [Maryland Tel. & Tel. Co. v. Ruth](#), 106 Md. 644, 68 A. 358 (1907).  
The holder of a second mortgage on real property was not liable in trespass to a joint owner of the subject realty for entering upon and managing the property, where that mortgagee did so with the acquiescence and consent of another joint owner under circumstances that adequately protected the interests of both owners. [Wilson v. Southern Discount Co.](#), 385 So. 2d 169 (Fla. 3d DCA 1980).

- 3                    [General Mills Restaurants, Inc. v. Texas Wings, Inc.](#), 12 S.W.3d 827 (Tex. App. Dallas 2000) (abrogated  
on other grounds by, [Environmental Processing Systems, L.C. v. FPL Farming Ltd.](#), 457 S.W.3d 414 (Tex.  
2015)).
- 4                    [Belluomo v. KAKE TV & Radio, Inc.](#), 3 Kan. App. 2d 461, 596 P.2d 832 (1979).
- 5                    [Kapler v. Kapler](#), 2000 ME 131, 755 A.2d 502 (Me. 2000) (wife gave permission, even though husband  
withdrew consent upon divorce).
- 6                    [Boyce v. Cassese](#), 941 So. 2d 932 (Ala. 2006).
- 7                    [FPL Farming Ltd. v. Environmental Processing Systems, L.C.](#), 383 S.W.3d 274 (Tex. App. Beaumont 2012),  
judgment rev'd on other grounds, 457 S.W.3d 414 (Tex. 2015).

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## 75 Am. Jur. 2d Trespass § 76

American Jurisprudence, Second Edition | May 2021 Update

### Trespass

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#### IV. Defenses

##### B. Privilege

##### 2. Consent or License

## § 76. Implied consent to trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  25

### Forms

[Am. Jur. Pleading and Practice Forms, Trespass § 81](#) (Answer—Defense—Implied consent—Entry pursuant to agreement to maintain fence)

Consent sufficient to constitute a defense to trespass may be implied from custom, usage, or conduct.<sup>1</sup> Consent or permission may also be implied when the owner's conduct would warrant a reasonable person to believe that the owner had given consent to enter the premises,<sup>2</sup> even in the absence of an invitation to enter.<sup>3</sup> For instance, one who engages in a conversation with an entrant and does not ask that person to leave may not later complain about a trespass.<sup>4</sup>

The landowner's knowledge of the entries and of the trespassers' resulting behavior is a key factor.<sup>5</sup> Actual willingness to allow entry may be inferred from inaction in the face of a prior entry, but only if the owner had actual knowledge of the trespasser's intention to enter.<sup>6</sup> For instance, habitual acquiescence in a trespass may constitute a license for persons to enter the land, if the tolerance is so pronounced as to be tantamount to permission.<sup>7</sup> However, an owner's failure to take unduly burdensome or futile steps to evict known trespassers does not imply consent to enter the land.<sup>8</sup> The absence of a "no trespassing" sign on private property does not mean that the owner gives the public permission to enter.<sup>9</sup>

When a business, public facility, or common area is open to the public, a person who enters the facility, at a reasonable time and in a reasonable manner, has the implied consent of the owner or the possessor to be there, and so long the person does not engage in an act inconsistent with the purposes of the business or facility, there is no trespass.<sup>10</sup>

Notwithstanding that one who remains in a home after being directed to leave is guilty of a wrongful entry and becomes a trespasser even though the original entry was peaceful and authorized,<sup>11</sup> where a homeowner has not indicated that he or she does not want to receive peddlers or solicitors, the custom is that they have implied consent to call.<sup>12</sup>

Where no signs forbid entry, and there is a recognizable pathway to a front door, a limited license to enter the property on the pathway and knock on the door exists.<sup>13</sup> The knocker installed on the front door of a home is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers, and peddlers of all kinds, and this implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then, absent invitation to linger longer, leave.<sup>14</sup> The implied license to approach a front door extends to both neighborly visitors and law enforcement officers alike.<sup>15</sup>

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#### Footnotes

- 1 [Dubuque Fire & Marine Ins. Co. v. Union Compress & Warehouse Co.](#), 143 F. Supp. 128 (W.D. La. 1956); [McCaig v. Talladega Pub. Co., Inc.](#), 544 So. 2d 875 (Ala. 1989); [St. Louis County v. Stone](#), 776 S.W.2d 885 (Mo. Ct. App. E.D. 1989); [General Mills Restaurants, Inc. v. Texas Wings, Inc.](#), 12 S.W.3d 827 (Tex. App. Dallas 2000) (abrogated on other grounds by, [Environmental Processing Systems, L.C. v. FPL Farming Ltd.](#), 457 S.W.3d 414 (Tex. 2015)) (from the owner's conduct or the condition of the land itself); [Fandrey ex rel. Connell v. American Family Mut. Ins. Co.](#), 2004 WI 62, 272 Wis. 2d 46, 680 N.W.2d 345 (2004).  
A license for entry upon a close may be implied from the habits of the country. [Florida v. Jardines](#), 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013).  
Even if a newspaper publisher's deposit of a free newspaper on a property owner's lawn was not protected under the First Amendment rights of free speech and freedom of the press, the publisher's actions did not rise to the level of trespass, as the deposit of a newspaper was the type of activity for which consent to entry into private property was implied, in absence of an order to contrary. [Reddy v. Plain Dealer Publishing Co.](#), 2013-Ohio-2329, 991 N.E.2d 1158 (Ohio Ct. App. 8th Dist. Cuyahoga County 2013).
- 2 [Fandrey ex rel. Connell v. American Family Mut. Ins. Co.](#), 2004 WI 62, 272 Wis. 2d 46, 680 N.W.2d 345 (2004).
- 3 [Rawls & Associates v. Hurst](#), 144 N.C. App. 286, 550 S.E.2d 219 (2001).
- 4 [Muir v. Ruder](#), 945 S.W.2d 33 (Mo. Ct. App. E.D. 1997); [Broughton v. McClatchy Newspapers, Inc.](#), 161 N.C. App. 20, 588 S.E.2d 20 (2003).
- 5 [Fandrey ex rel. Connell v. American Family Mut. Ins. Co.](#), 2004 WI 62, 272 Wis. 2d 46, 680 N.W.2d 345 (2004).
- 6 [Colmus v. Sergeeva](#), 175 Or. App. 131, 27 P.3d 166 (2001).
- 7 [Sumner v. Hebenstreit](#), 167 Ill. App. 3d 881, 118 Ill. Dec. 888, 522 N.E.2d 343 (5th Dist. 1988).
- 8 [General Mills Restaurants, Inc. v. Texas Wings, Inc.](#), 12 S.W.3d 827 (Tex. App. Dallas 2000) (abrogated on other grounds by, [Environmental Processing Systems, L.C. v. FPL Farming Ltd.](#), 457 S.W.3d 414 (Tex. 2015)).
- 9 [Sharpe v. Turley](#), 191 S.W.3d 362 (Tex. App. Dallas 2006).
- 10 [St. Louis County v. Stone](#), 776 S.W.2d 885 (Mo. Ct. App. E.D. 1989).  
As to the application of this rule with respect to business invitees, see § 40.  
As to termination and revocation of consent, generally, see § 80.
- 11 § 39.
- 12 [Am. Jur. 2d, Peddlers, Solicitors, and Transient Dealers](#) § 78.

- 13                      [State v. Crowley, 232 So. 3d 473 \(Fla. 1st DCA 2017\).](#)
- 14                      [Florida v. Jardines, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 \(2013\).](#)
- 15                      [State v. Crowley, 232 So. 3d 473 \(Fla. 1st DCA 2017\).](#)

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## 75 Am. Jur. 2d Trespass § 77

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### Trespass

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#### IV. Defenses

##### B. Privilege

##### 2. Consent or License

### § 77. Scope of consent to trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  25

#### Forms

[Am. Jur. Legal Forms 2d § 249:5](#) (Notice to licensee—Demand to discontinue deviation from license or suffer revocation of license)

Consent from the owner of land is a valid defense to a trespass action of acts done within its scope.<sup>1</sup> The acts of the party accused of trespass must not exceed, nor conflict with, the purposes for which the consent was given.<sup>2</sup> For instance, an open invitation to friends and family members does not imply an open invitation for other members of the community to enter at their will, so as to negate a trespass claim.<sup>3</sup>

Permission to accomplish any particular enterprise carries with it authority to do all that is necessary to effect the principal object.<sup>4</sup>

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#### Footnotes



- 1                    [McCaig v. Talladega Pub. Co., Inc.](#), 544 So. 2d 875 (Ala. 1989); [Matanuska Elec. Ass'n, Inc. v. Weissler](#), 723 P.2d 600 (Alaska 1986); [Rosenthal v. City of Crystal Lake](#), 171 Ill. App. 3d 428, 121 Ill. Dec. 869, 525 N.E.2d 1176 (2d Dist. 1988); [Mitchell v. Baltimore Sun Co.](#), 164 Md. App. 497, 883 A.2d 1008 (2005).  
The scope of a license, express or implied, to approach the front door of a home is limited not only to a particular area but also to a specific purpose. [United States v. Bain](#), 874 F.3d 1 (1st Cir. 2017), cert. denied, 138 S. Ct. 1593, 200 L. Ed. 2d 780 (2018).
- 2                    [Belluomo v. KAKE TV & Radio, Inc.](#), 3 Kan. App. 2d 461, 596 P.2d 832 (1979).
- 3                    [Mitchell v. Baltimore Sun Co.](#), 164 Md. App. 497, 883 A.2d 1008 (2005).
- 4                    [Matanuska Elec. Ass'n, Inc. v. Weissler](#), 723 P.2d 600 (Alaska 1986); [Granger v. Postal Tel. Co.](#), 70 S.C. 528, 50 S.E. 193 (1905).

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## 75 Am. Jur. 2d Trespass § 78

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### Trespass

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#### IV. Defenses

##### B. Privilege

##### 2. Consent or License

### § 78. Scope of consent to trespass—Conditional or restricted consent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  25

A conditional or restricted consent to enter land creates a privilege to do so only to the extent that the actor complies with the condition or restriction.<sup>1</sup>

A consent given by a possessor of land to the actor's presence on a part of the land does not create a privilege to enter or remain on any other part.<sup>2</sup> A consent given by a possessor of land to the actor's presence during a specified period does not create a privilege to enter or remain on the land at any other time.<sup>3</sup>

One may become a trespasser by exceeding the scope of the consent,<sup>4</sup> such as by intentionally conducting oneself in a manner differing from that allowed.<sup>5</sup> Thus, a person who enters an area open to the public, at a reasonable time and in a reasonable manner, has the implied consent of the owner to enter and remain under a limited privilege, and there is no trespass until the person's conduct exceeds the privilege, or the person is requested to leave by an agent or representative of the owner or possessor and refuses to do so, making his or her continued presence a trespass.<sup>6</sup>

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#### Footnotes

- <sup>1</sup> [Murphy v. Fannin County Elec. Co-op., Inc.](#), 957 S.W.2d 900 (Tex. App. Texarkana 1997).  
Restatement Second, Torts § 168.
- <sup>2</sup> [Matanuska Elec. Ass'n, Inc. v. Weissler](#), 723 P.2d 600 (Alaska 1986).  
Restatement Second, Torts § 169.

- 3                   Restatement Second, Torts § 170.
- 4                   Special Force Ministries v. WCCO Television, 584 N.W.2d 789 (Minn. Ct. App. 1998); Morton v. Crider, 126 S.W.3d 803 (Mo. Ct. App. S.D. 2004).  
A cable television provider exceeded the scope of any license an electric company could have given it to use the company's prescriptive easement, and trespassed when it failed to obtain the property owners' permission to run fiber optic cable along the electric poles. Ogg v. Mediacom, L.L.C., 142 S.W.3d 801 (Mo. Ct. App. W.D. 2004).
- 5                   Matanuska Elec. Ass'n, Inc. v. Weissler, 723 P.2d 600 (Alaska 1986).  
While the operator of care facilities for retarded persons initially welcomed an individual onto its property as a volunteer, the person's continuing presence became unlawful when it developed that the "volunteer" was actually a television station employee, who exceeded the scope of the consent by secretly videotaping the operator's activities. Special Force Ministries v. WCCO Television, 584 N.W.2d 789 (Minn. Ct. App. 1998).
- 6                   St. Louis County v. Stone, 776 S.W.2d 885 (Mo. Ct. App. E.D. 1989).  
As to persons whose actions are not consistent with the purpose of an invitation to conduct business, see § 40.

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## 75 Am. Jur. 2d Trespass § 79

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### Trespass

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#### IV. Defenses

##### B. Privilege

##### 2. Consent or License

### § 79. Invalidation of consent to trespass by mistake, misrepresentation, or duress

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  25

If a person is induced to consent by a substantial mistake, concerning the nature of the invasion of one's interests or the extent of the harm to be expected from it, and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective.<sup>1</sup>

#### Comment:

The conduct that is legally important is consent to the actor's conduct, rather than to its consequences; thus, the fact that the plaintiff is acting under a unilateral mistake regarding the invasion to be expected from the conduct, and the extent to which harm will follow, does not make the consent ineffective, if the actor relies upon it and does not know of the mistake.<sup>2</sup>

Neither express nor implied consent constitutes a viable defense to a trespass action, if it was obtained by misrepresentation or fraud.<sup>3</sup> This rule has been applied in actions alleging tortious trespass in newsgathering, where the purported consent, upon which the defense is based, was fraudulently induced;<sup>4</sup> however if the plaintiff consented to the defendant's reporters being

in the nonpublic area of one's business premises at a particular time, any later revocation of the consent is immaterial.<sup>5</sup> It has elsewhere been held that consent given to a reporter was valid notwithstanding misrepresentations, because the reporter did not invade any specific interest relating to the peaceable possession of land that the tort of trespass seeks to protect, where the reporter was only in public areas of the establishment and did not disrupt the business or invade private space, and thus the consent may be given effect, even though the entrant had intentions that, if known to the owner, would cause the owner to revoke it.<sup>6</sup> There is also authority that private investigators were authorized to enter, and thus did not trespass, even though consent to the entry was based on the investigators' misrepresentations.<sup>7</sup>

**Observation:**

Mistake negates a landowner's consent to trespass only in two situations: (1) where the trespasser knew of the mistake, or (2) where the mistake was induced by the trespasser's misrepresentation.<sup>8</sup>

Whether consent was induced by misrepresentation is a question of fact if the evidence is conflicting.<sup>9</sup>

Consent obtained by duress upon the possessor of land exerted by the actor, or by a third person to the knowledge of the actor, is not effective.<sup>10</sup>

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Footnotes

- 1 Restatement Second, Torts § 892B(2).
- 2 Restatement Second, Torts § 892B(1), comment c.
- 3 *Shiffman v. Empire Blue Cross and Blue Shield*, 256 A.D.2d 131, 681 N.Y.S.2d 511 (1st Dep't 1998).
- 4 *Belluomo v. KAKE TV & Radio, Inc.*, 3 Kan. App. 2d 461, 596 P.2d 832 (1979); *Shiffman v. Empire Blue Cross and Blue Shield*, 256 A.D.2d 131, 681 N.Y.S.2d 511 (1st Dep't 1998) (reporter posed as patient, and used a false identity).
- 5 *Belluomo v. KAKE TV & Radio, Inc.*, 3 Kan. App. 2d 461, 596 P.2d 832 (1979).
- 6 *American Transmission, Inc. v. Channel 7 of Detroit, Inc.*, 239 Mich. App. 695, 609 N.W.2d 607 (2000).
- 7 *Keyzer v. Amerlink, Ltd.*, 173 N.C. App. 284, 618 S.E.2d 768 (2005), *aff'd*, 360 N.C. 397, 627 S.E.2d 462 (2006).
- 8 *Marlow v. City of Sisters*, 281 Or. App. 462, 383 P.3d 908 (2016).
- 9 *Belluomo v. KAKE TV & Radio, Inc.*, 3 Kan. App. 2d 461, 596 P.2d 832 (1979).
- 10 Restatement Second, Torts § 172.

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## 75 Am. Jur. 2d Trespass § 80

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#### IV. Defenses

##### B. Privilege

##### 2. Consent or License

### § 80. Termination or revocation of consent to trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  25

Although consent to entry is generally a defense to an action for trespass, consent may later be revoked.<sup>1</sup> A property owner's conduct in allowing fill material to spill onto a neighbor's lot, after any consent given by the neighbor's predecessor in title to allow for such spillage was terminated, constitutes a trespass.<sup>2</sup>

Subject to the privileges of reasonable egress and removal of objects from land,<sup>3</sup> the actor's privilege to enter land created by consent of the possessor is terminated by the doing of any act, or the happening of any event, or the lapse of any specified period of time by which the consent is restricted; by a revocation of the possessor's consent, of which the actor knows or has reason to know; or, by a transfer or other termination of the possessor's possessory interest in the land.<sup>4</sup> For instance, a complete defense to trespass does not exist if the defendant's only right to be on the land was a privilege under an oral license, which could be terminated by a transfer of the property.<sup>5</sup>

The implied consent of one to enter a business or public facility open to the public, at a reasonable time and in a reasonable manner,<sup>6</sup> is revoked by prolonged, boisterous conduct, breach of the peace, blocking of entrances, interference with the public, picketing, or other acts inconsistent with the purposes of the business or facility.<sup>7</sup>

Liability for other tortuous acts linked to an entry vitiates consent for that entry, for purposes of a claim for trespass.<sup>8</sup>

A person whose license is revoked must be given a reasonable opportunity to leave, and during that time is not a trespasser.<sup>9</sup>

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Footnotes

- 1 [Movrich v. Lobermeier](#), 2018 WI 9, 379 Wis. 2d 269, 905 N.W.2d 807 (2018).
- 2 [Lee v. Konrad](#), 337 P.3d 510 (Alaska 2014).
- 3 [§ 86](#).
- 4 [Restatement Second, Torts § 171](#).
- 5 [Busada v. Ransom Motors, Inc.](#), 31 Md. App. 704, 358 A.2d 258 (1976); [River Valley Associates v. Consolidated Rail Corp.](#), 182 A.D.2d 974, 581 N.Y.S.2d 935 (3d Dep't 1992).
- 6 [§ 74](#).
- 7 [St. Louis County v. Stone](#), 776 S.W.2d 885 (Mo. Ct. App. E.D. 1989).  
As to revocation of an invitation to transact business by inconsistent conduct, see [§ 40](#).
- 8 [Council on American-Islamic Relations Action Network, Inc. v. Gaubatz](#), 82 F. Supp. 3d 344 (D.D.C. 2015).
- 9 [Sammons v. American Auto. Ass'n](#), 912 P.2d 1103 (Wyo. 1996).

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## 75 Am. Jur. 2d Trespass § 81

American Jurisprudence, Second Edition | May 2021 Update

### Trespass

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#### IV. Defenses

##### B. Privilege

##### 3. Authority of Law

## § 81. Law enforcement officers as authorized to enter property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  24

Conduct otherwise a trespass is often justifiable by reason of authority vested in the person who does the act,<sup>1</sup> including an officer of the law acting in the performance of one's duty.<sup>2</sup> Thus, a law enforcement officer is privileged to commit a trespass if the officer is exercising lawful authority in a reasonable manner causing no unnecessary harm.<sup>3</sup> A duty or authority imposed or created by a legislative enactment carries with it the privilege to enter land in the possession of another for the purpose of performing or exercising that duty or authority, to the extent entry is reasonably necessary, only if all the requirements of the enactment are fulfilled.<sup>4</sup> Law enforcement officers who enter premises without authority are subject to common law trespass actions,<sup>5</sup> and trespass will lie for an unconstitutional entry.<sup>6</sup> An inspector who was present at a police officers' search of property pursuant to an invalid administrative warrant is not relieved from liability for trespass by the fact that the inspector did not participate in seeking or obtaining the warrant.<sup>7</sup> Law enforcement officers may be protected by qualified immunity under both statute and common law from an arrestee's tort claim of trespass.<sup>8</sup>

An officer of the law is privileged to make an entry to—

— arrest for a criminal offense.<sup>9</sup>

— recapture a person who has been previously arrested or has given security for a court appearance.<sup>10</sup>

— assist in making an arrest or other apprehension.<sup>11</sup>



Even when a person is engaged in lawful public work, there will be liability for any trespass that is not necessary as an incident to that work.<sup>12</sup> While the use of force is authorized under some circumstances,<sup>13</sup> an agent's unreasonable use of force is a trespass that is not shielded by privilege.<sup>14</sup>

A party acting pursuant to and within the scope of a valid court order is not liable for trespass.<sup>15</sup>

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#### Footnotes

- 1 [Montgomery v. Reorganized School Dist. No. 1, Dade County, 339 S.W.2d 831, 90 A.L.R.2d 1201 \(Mo. 1960\).](#)  
[Restatement Second, Torts §§ 204 to 211.](#)
- 2 [Department of Environmental Protection v. Hardy, 907 So. 2d 655 \(Fla. 5th DCA 2005\)](#) (state environmental specialist); [Korsinsky v. Rose, 120 A.D.3d 1307, 993 N.Y.S.2d 92 \(2d Dep't 2014\)](#) (city marshal executing court order); [Peters v. Vinatieri, 102 Wash. App. 641, 9 P.3d 909 \(Div. 2 2000\)](#) (county inspector at recreational vehicle park); [Hoblyn v. Johnson, 2002 WY 152, 55 P.3d 1219 \(Wyo. 2002\)](#) (brand inspector entering to seize horse).
- 3 [Downs v. U.S., 522 F.2d 990, 36 A.L.R. Fed. 219 \(6th Cir. 1975\).](#)
- 4 [Peters v. Vinatieri, 102 Wash. App. 641, 9 P.3d 909 \(Div. 2 2000\); Hoblyn v. Johnson, 2002 WY 152, 55 P.3d 1219 \(Wyo. 2002\).](#)  
[Restatement Second, Torts § 211.](#)
- 5 [Turner v. Sheriff of Marion County, 94 F. Supp. 2d 966 \(S.D. Ind. 2000\).](#)
- 6 [Paine v. Savage, 126 Me. 121, 136 A. 664, 51 A.L.R. 1194 \(1927\).](#)  
Even if an initial warrantless entry was justified under the "fresh pursuit" doctrine, the officers' explanation for their second warrantless entry into a suspect's home was inadequate to support the conclusion that second trespass was also privileged, allowing a trial on that trespass claim. [Bittner v. Huth, 162 Md. App. 745, 876 A.2d 157 \(2005\).](#)
- 7 [Bosteder v. City of Renton, 155 Wash. 2d 18, 117 P.3d 316 \(2005\).](#)
- 8 [Maness v. Daily, 307 P.3d 894 \(Alaska 2013\).](#)  
Simply because an actor's conduct satisfies the type of intent necessary to establish the tort of trespass, it does not follow that the same conduct is necessarily an intentional act that bars application of the doctrine of qualified immunity. [Williams v. Pate, 2015 Ark. App. 327, 463 S.W.3d 734, 320 Ed. Law Rep. 501 \(2015\).](#)
- 9 [Restatement Second, Torts § 204.](#)
- 10 [Restatement Second, Torts § 205.](#)
- 11 [Restatement Second, Torts § 207.](#)
- 12 [Foremost Ins. Co. v. Public Service Com'n of Missouri, 985 S.W.2d 793 \(Mo. Ct. App. W.D. 1998\).](#)
- 13 [Restatement Second, Torts § 206.](#)
- 14 [Downs v. U.S., 522 F.2d 990, 36 A.L.R. Fed. 219 \(6th Cir. 1975\)](#) (shooting to disable an airplane to prevent it from departing after a hijacking).
- 15 [Skierkewicz v. Gonzalez, 711 F. Supp. 931 \(N.D. Ill. 1989\); Reisdorff v. County of Yellowstone, 1999 MT 280, 296 Mont. 525, 989 P.2d 850 \(1999\)](#) (overruled on other grounds by, [Miller v. City of Red Lodge, 2003 MT 44, 314 Mont. 278, 65 P.3d 562 \(2003\)](#)) (animal control officer protected by an order of a justice of the peace); [Wells v. Town of Lenox, 110 A.D.3d 1192, 974 N.Y.S.2d 591 \(3d Dep't 2013\).](#)  
[Restatement Second, Torts § 210.](#)

## 75 Am. Jur. 2d Trespass § 82

American Jurisprudence, Second Edition | May 2021 Update

### Trespass

Eric C. Surette, J.D.

#### IV. Defenses

##### B. Privilege

##### 3. Authority of Law

## § 82. Persons found to be authorized to enter property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  24

Acts otherwise constituting a trespass may be justified by reason of authority vested in such persons as—

- union agents, engaged in a lawful union activity.<sup>1</sup>
- firefighters entering a premises to investigate reports of a fire or to actually fight one.<sup>2</sup>
- physicians and emergency medical technicians authorized to investigate reports of elder abuse.<sup>3</sup>
- representatives of humane societies investigating animal abuse complaints.<sup>4</sup>
- process servers entering property, in a normal manner, to ring the doorbell,<sup>5</sup> or who walk through an open door.<sup>6</sup>
- a conservator, who entered the ward's residence to change the locks to secure it for sale.<sup>7</sup>
- a building owner, who entered adjacent land to erect scaffolding required by law.<sup>8</sup>
- a state agency, throwing snow on a person's property while clearing streets.<sup>9</sup>
- power companies running electric transmission lines.<sup>10</sup>
- telephone companies erecting poles<sup>11</sup> or laying cable under a state road easement,<sup>12</sup> under the authority of a public agency.

A bail bondsman may commit a trespass, if the bondsman does not have a search warrant or other authority to search the premises.<sup>13</sup>

A permit to install a sewer line in a legally recorded easement does not justify a trespass if the line is installed before the condition of obtaining an easement is met.<sup>14</sup>

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#### Footnotes

- 1 [In re Catalano](#), 29 Cal. 3d 1, 171 Cal. Rptr. 667, 623 P.2d 228 (1981).
- 2 [State v. Howard](#), 184 Neb. 274, 167 N.W.2d 80 (1969).  
[Restatement Second, Torts § 196.](#)
- 3 [Easton v. Sutter Coast Hosp.](#), 80 Cal. App. 4th 485, 95 Cal. Rptr. 2d 316 (1st Dist. 2000).
- 4 [Reisdorff v. County of Yellowstone](#), 1999 MT 280, 296 Mont. 525, 989 P.2d 850 (1999) (overruled on other grounds by, [Miller v. City of Red Lodge](#), 2003 MT 44, 314 Mont. 278, 65 P.3d 562 (2003)); [Mesgleski v. Oraboni](#), 330 N.J. Super. 10, 748 A.2d 1130 (App. Div. 2000); [Hand v. Stray Haven Humane Soc. and S.P.C.A., Inc.](#), 21 A.D.3d 626, 799 N.Y.S.2d 628 (3d Dep't 2005).
- 5 [Kucker v. Kaminsky & Rich](#), 7 A.D.3d 491, 776 N.Y.S.2d 72 (2d Dep't 2004).
- 6 [Harris v. Carbonneau](#), 165 Vt. 433, 685 A.2d 296 (1996).
- 7 [Zanoni v. Hudon](#), 42 Conn. App. 70, 678 A.2d 12 (1996) (precluding a trespass claim by the ward's child who was excluded from using the property).
- 8 [22 Irving Place Corp. v. 30 Irving LLC](#), 57 Misc. 3d 253, 60 N.Y.S.3d 640 (Sup 2017).
- 9 [Ondovchik Family Ltd. Partnership v. Agency of Transp.](#), 187 Vt. 556, 2010 VT 35, 996 A.2d 1179 (2010).
- 10 [Brassette v. Central Louisiana Elec. Co., Inc.](#), 383 So. 2d 120 (La. Ct. App. 3d Cir. 1980).  
[Restatement Second, Torts § 191.](#)
- 11 [Brammer v. Iowa Telephone Co.](#), 182 Iowa 865, 165 N.W. 117, 1 A.L.R. 400 (1917).
- 12 [Harlingen Irrigation Dist. Cameron County No. 1 v. Caprock Communications Corp.](#), 49 S.W.3d 520 (Tex. App. Corpus Christi 2001).
- 13 [Milburn v. Vinson](#), 850 So. 2d 1219 (Miss. Ct. App. 2002).
- 14 [Moore v. Leveris](#), 128 N.C. App. 276, 495 S.E.2d 153 (1998).

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## 75 Am. Jur. 2d Trespass § 83

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### Trespass

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#### IV. Defenses

##### B. Privilege

##### 4. To Remove Object from Land

##### a. By Owner of Personal Property

## § 83. Removal of personal property by its owner on land with prior consent of possessor of land

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  23

### Forms

[Am. Jur. Pleading and Practice Forms, Trespass § 80](#) (Answer—Defense—Entry to reclaim personal property)

A number of privileges apply to protect from trespass one who removes personal property or a fixture from land in the possession of another, there by virtue of a prior consent or license by the possessor or the possessor's predecessor in interest, at a reasonable time, in a reasonable manner, and with reasonable promptness, including the privilege of—

— a former licensee to remove things from the land originally placed there with consent that is subsequently terminated or suspended.<sup>1</sup>

— a former tenant leaving land after a reversioner or remainderman has taken possession.<sup>2</sup>

— a tenant of land or a successor in interest, who is entitled after the expiration of the tenancy to a crop planted by the tenant during the tenancy.<sup>3</sup>

— a tenant of land or a successor in interest, who is entitled at the expiration of the tenancy to a structure or other thing erected on or affixed to the land during the tenancy.<sup>4</sup>

— transferees, transferors, lessors, holders of security interests or mortgages, and bailors with reserved rights and interests in a thing on the subject land.<sup>5</sup>

Revocation of a license that permitted placing the licensee's personal property on the real estate does not instantly change the licensee's status to that of a trespasser, since the licensee has the right to remove the property, including to enter the real property, for a reasonable time.<sup>6</sup>

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#### Footnotes

- |   |  |
|---|--|
| 1 | <a href="#">Restatement Second, Torts § 177.</a>   |
| 2 | <a href="#">Restatement Second, Torts § 178.</a>   |
| 3 | <a href="#">Restatement Second, Torts § 179.</a>   |
| 4 | <a href="#">Restatement Second, Torts § 180.</a>   |
| 5 | <a href="#">Restatement Second, Torts §§ 182, 183.</a>   |
| 6 | <a href="#">Cablevision of Boston, Inc. v. Shamatta, 63 Mass. App. Ct. 523, 827 N.E.2d 246 (2005).</a> |

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## 75 Am. Jur. 2d Trespass § 84

American Jurisprudence, Second Edition | May 2021 Update

### Trespass

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#### IV. Defenses

##### B. Privilege

##### 4. To Remove Object from Land

##### a. By Owner of Personal Property

### § 84. Right of owner of personal property to remove it where property is on land other than with actor's consent or fault

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  23

#### Forms

[Am. Jur. Pleading and Practice Forms, Trespass § 80](#) (Answer—Defense—Entry to reclaim personal property)

One is privileged to enter land in the possession of another, at a reasonable time and in a reasonable manner, for the purpose of removing a chattel to which the actor is entitled to immediate possession, and which has come upon the land otherwise than as a result of the actor's consent, tortious conduct, or contributory negligence.<sup>1</sup> However, the person is subject to liability for any harm done in the exercise of the privilege to any legally protected interest of the possessor of the land or connected with it, except where the item is on the land through the tortious conduct or contributory negligence of the possessor.<sup>2</sup>

#### Comment:

The item may come upon the land through the operation of natural forces, by the act of the possessor of the land, or by the act of a third person with or without the consent of the possessor.<sup>3</sup>

This rule was applied in a case holding that one had the privilege to enter real property to retrieve a horse, at a reasonable time and in a reasonable manner, and this could also be accomplished through an agent.<sup>4</sup> However, it has elsewhere been said, in the context of a former owner entering the realty after the closing to take possession of any personal property left there, that there is no authority for taking and carrying away even one's own personal property through the commission of a trespass upon the real property of another.<sup>5</sup> Similarly, the entry of a former tenant to remove a fixture that the tenant formerly owned but failed to remove within a reasonable time after the end of the tenancy constituted a trespass.<sup>6</sup>

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#### Footnotes

- 1 [Restatement Second, Torts § 198\(1\).](#)
- 2 [Restatement Second, Torts § 198\(2\).](#)
- 3 [Restatement Second, Torts § 198, comment a.](#)
- 4 [Hoblyn v. Johnson, 2002 WY 152, 55 P.3d 1219 \(Wyo. 2002\).](#)
- 5 [Garrett v. Valley Sand and Gravel, Inc., 800 So. 2d 600 \(Ala. Civ. App. 2000\).](#)
- 6 [Adams Outdoor Advertising Ltd. Partnership v. Long, 253 Va. 206, 483 S.E.2d 224 \(1997\).](#)

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## 75 Am. Jur. 2d Trespass § 85

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### Trespass

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#### IV. Defenses

##### B. Privilege

##### 4. To Remove Object from Land

##### a. By Owner of Personal Property

### § 85. Necessity of demand by owner of chattel to remove it from land of another

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  23

Ordinarily, before the owner of a chattel, on another's land through no fault or contributory negligence of his or her own, is privileged to enter the possessor's land to retake it,<sup>1</sup> one must make a demand on the possessor, either to deliver the item at the border of the possessor's property or to permit the owner of the item to enter to retrieve it, unless such a demand would be futile or the necessary delay would subject the item to serious harm.<sup>2</sup> Otherwise, where personal property is placed or left on the real property of another by the fault of its owner, the owner of the item may not enter for the purpose of retaking it without becoming a trespasser.<sup>3</sup> This principle applies when the chattel has been placed on the land without the fault or consent of either party.<sup>4</sup> One may also enter the land for the purpose of demanding the return of one's property.<sup>5</sup>

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#### Footnotes

- <sup>1</sup> [§ 84.](#)
- <sup>2</sup> [Restatement Second, Torts § 198](#), comment d.  
The owner of a horse could enter the property through an agent to retrieve it, once the possessors refused a request to return it. [Hoblyn v. Johnson](#), 2002 WY 152, 55 P.3d 1219 (Wyo. 2002).
- <sup>3</sup> [McGill v. Holman](#), 208 Ala. 9, 93 So. 848, 31 A.L.R. 941 (1922).
- <sup>4</sup> [Maulsby v. Cook](#), 134 Wash. 133, 235 P. 23 (1925).



5 [Arlofski v. Foglio, 105 Conn. 342, 135 A. 397, 53 A.L.R. 481 \(1926\)](#) (straying cattle impounded by neighbor).

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## 75 Am. Jur. 2d Trespass § 86

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### Trespass

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#### IV. Defenses

##### B. Privilege

##### 4. To Remove Object from Land

##### b. By Possessor of Land

### § 86. Removal of personal property left by another by possessor of land, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  23

An owner of land may remove the personal property of another, placed on the land without a right to do so, after reasonable notice to its owner to remove it.<sup>1</sup> Belief in one's right to place a thing on the property of another, no matter how honestly and reasonably entertained, is not a justification for preventing the subsequent removal of an offending structure, nor is the great expense of removal, where there has been a deliberate invasion of the possessor's title to real estate.<sup>2</sup>

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#### Footnotes

- <sup>1</sup> [Maryland Tel. & Tel. Co. v. Ruth](#), 106 Md. 644, 68 A. 358 (1907) (telephone pole).
- <sup>2</sup> [Brinkley v. Brinkley](#), 174 Ill. App. 3d 705, 124 Ill. Dec. 353, 529 N.E.2d 70 (5th Dist. 1988) (landowners sought a mandatory injunction for the removal of a pipeline from their property).

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## 75 Am. Jur. 2d Trespass § 87

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### Trespass

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#### IV. Defenses

##### B. Privilege

##### 4. To Remove Object from Land

##### b. By Possessor of Land

### § 87. Right to enter other land to return item

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  23

A possessor of land who, or whose predecessor in legal interest, has consented to another's placing or leaving a thing there on the condition that it be subsequently removed, which the other person has unreasonably failed to do, is privileged, at a reasonable time and in a reasonable manner, to enter land in the possession of the other person to place the thing there.<sup>1</sup> A similar privilege exists to enter land in the possession of another for the purpose of relieving one's own land of personal property, which has come upon the land otherwise than with the possessor's consent or by the possessor's tortious conduct or contributory negligence, to the possession of the one entitled to the personal property.<sup>2</sup>

#### Comment:

The provisions described in the preceding two sentences are distinguished on whether the personal property came onto the land with the possessor's consent.<sup>3</sup> The latter provision applies to an item that has come upon the land, either because of the conduct of the person entitled to possession of the personal property, or through the operation of a force of nature or other innocent cause.<sup>4</sup> However, circumstances may make it reasonable to require that the possessor of the land notify the other person that the item is on the land and to give that person an opportunity to remove it, before the actor is privileged to enter the other's land and place the chattel there.<sup>5</sup> It is also immaterial that the other person has purported to abandon the item.<sup>6</sup>

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Footnotes

- 1 [Restatement Second, Torts § 184.](#)
- 2 [Restatement Second, Torts § 199\(1\).](#)  
One did not trespass on neighbor's land by moving the neighbor's boat dock back to the neighbor's land, since the neighbor was trespassing by having the dock on the actor's property. [Macios v. Hensley, 886 S.W.2d 749 \(Mo. Ct. App. E.D. 1994\).](#)
- 3 [Restatement Second, Torts § 184](#), comment d.
- 4 [Restatement Second, Torts § 199](#), comment b.
- 5 [Restatement Second, Torts § 199](#), comment c.
- 6 [Restatement Second, Torts § 199](#), comment c.

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## 75 Am. Jur. 2d Trespass § 88

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#### IV. Defenses

##### B. Privilege

##### 4. To Remove Object from Land

##### b. By Possessor of Land

### § 88. Degree of care in removing personal property left by another by possessor of land

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  23

In removing an item of personal property that has come on one's land without consent, a landowner is not liable for the harm done in the exercise of this privilege, unless the harm is unnecessary or unreasonable.<sup>1</sup> Thus, a property owner may remove items of personal property that are wrongfully on the land, if the landowner uses due care.<sup>2</sup> The possessor of the land is only privileged to exercise as much dominion and control over the trespassing item as is necessary to remove it.<sup>3</sup>

#### Observation:

One trespass does not excuse another, and one who negligently damages property is liable, notwithstanding that it being at the place was a trespass.<sup>4</sup>

Footnotes

- 1 Restatement Second, Torts § 199(2).
- 2 *Rossi v. Ventresca Bros. Const. Co., Inc.*, 94 Misc. 2d 756, 405 N.Y.S.2d 375 (N.Y. City Ct. 1978).
- 3 *Melbourne Bros. Const. Co. v. Pioneer Co.*, 181 W. Va. 816, 384 S.E.2d 857 (1989).
- 4 *Louisville & N.R. Co. v. Joullian*, 116 Miss. 40, 76 So. 769 (1917).

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## 75 Am. Jur. 2d Trespass V A Refs.

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### Trespass

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### V. Remedies; Damages

#### A. In General

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest


West's Key Number Digest, [Trespass](#)  [16](#), [17](#)

### A.L.R. Library

A.L.R. Index, Defenses

A.L.R. Index, Injunctions

A.L.R. Index, Trespass

West's A.L.R. Digest, [Trespass](#)  [16](#), [17](#)

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## 75 Am. Jur. 2d Trespass § 89

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### Trespass

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#### V. Remedies; Damages

##### A. In General

##### 1. Common Law and Equitable Remedies, Generally

## § 89. Remedies for trespass, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  16, 17

A claim of trespass is commonly recognized as a tort-based claim.<sup>1</sup> Trespass provides a remedy for all forcible, direct, and immediate injuries, whether to a person or to property, or, in other words, for the kind of conduct likely to lead to a breach of the peace by provoking immediate retaliation.<sup>2</sup>

"Trespass quare clausum fregit" is the remedy resorted to by one in the possession of real estate as against one who wrongfully and forcibly entered upon the premises.<sup>3</sup>

"Trespass on the case" is the remedy given to the owner of the fee for a trespass where the damage was peculiar to the land itself.<sup>4</sup> To recover under the trespass on the case theory one must have legal title to the real estate, or a reversionary interest therein, at the time of the injury to the real property.<sup>5</sup>

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### Footnotes

- <sup>1</sup> [Christiansen v. City of Tulsa](#), 332 F.3d 1270 (10th Cir. 2003); [Perrilloux v. Stilwell](#), 814 So. 2d 60 (La. Ct. App. 1st Cir. 2002); [Tibert v. Slominski](#), 2005 ND 34, 692 N.W.2d 133 (N.D. 2005); [Gakin v. City of Rapid City](#), 2005 SD 68, 698 N.W.2d 493 (S.D. 2005).
- <sup>2</sup> [Lombard v. Edward J. Peters, Jr., P.C.](#), 79 Conn. App. 290, 830 A.2d 346 (2003).
- <sup>3</sup> [Mueller v. Hill](#), 158 Idaho 208, 345 P.3d 998 (2015).
- <sup>4</sup> [Mueller v. Hill](#), 158 Idaho 208, 345 P.3d 998 (2015).



5 [Mueller v. Hill, 158 Idaho 208, 345 P.3d 998 \(2015\).](#)

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## 75 Am. Jur. 2d Trespass § 90

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### Trespass

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#### V. Remedies; Damages

##### A. In General

##### 1. Common Law and Equitable Remedies, Generally

## § 90. Remedy of assumpsit for trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  [16](#), [17](#)

In the absence of a statute providing to the contrary, assumpsit does not lie for a naked trespass on lands.<sup>1</sup> However, if the wrongful act of trespassing on real property results in some benefit to the property or estate of the trespasser, then the law will imply a promise on the trespasser's part to pay for the benefits received, and assumpsit may, subject to certain qualifications and limitations, be maintained.<sup>2</sup>

Where a portion of the real property has been severed and converted, the owner thereof may, as a general rule, waive the trespass and proceed against the trespasser in assumpsit for the recovery of such damages as the owner may have sustained.<sup>3</sup>

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### Footnotes

- <sup>1</sup> [Raven Red Ash Coal Co. v. Ball](#), 185 Va. 534, 39 S.E.2d 231, 167 A.L.R. 785 (1946).
- <sup>2</sup> [Raven Red Ash Coal Co. v. Ball](#), 185 Va. 534, 39 S.E.2d 231, 167 A.L.R. 785 (1946).
- <sup>3</sup> [Raven Red Ash Coal Co. v. Ball](#), 185 Va. 534, 39 S.E.2d 231, 167 A.L.R. 785 (1946).

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## 75 Am. Jur. 2d Trespass § 91

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### Trespass

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### V. Remedies; Damages

#### A. In General

#### 2. Remedy for Continuing Trespass

## § 91. Remedy for continuing trespass, generally; injunctive relief

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  [16](#), [17](#)

### A.L.R. Library

[Injunction against repeated or continuing trespasses on real property](#), 60 A.L.R.2d 310

[Mandatory injunction to compel removal of encroachments by adjoining landowner](#), 28 A.L.R.2d 679

### Forms

[Am. Jur. Pleading and Practice Forms, Trespass §§ 59 to 64](#) (Complaint, petition, or declaration—Equitable relief)

The usual remedy for a continuing trespass is a permanent injunction which, in the case of an encroachment on the plaintiff's land, would be a mandatory injunction for removal of the encroachment.<sup>1</sup> When a plaintiff seeks injunctive relief from continuing or repeated trespasses, the plaintiff must demonstrate his or her continuing possession of the property at the time the injunction is issued.<sup>2</sup>

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Footnotes

- 1 [Williams v. South & South Rentals, Inc., 82 N.C. App. 378, 346 S.E.2d 665 \(1986\).](#)
- 2 [Boyne v. Town of Glastonbury, 110 Conn. App. 591, 955 A.2d 645 \(2008\).](#)

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## 75 Am. Jur. 2d Trespass § 92

American Jurisprudence, Second Edition | May 2021 Update

### Trespass

Eric C. Surette, J.D.

#### V. Remedies; Damages

##### A. In General

##### 2. Remedy for Continuing Trespass

### § 92. Factors in determining appropriateness of injunction to remedy trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  16, 17

The appropriateness of the remedy of injunction against a trespass depends upon a comparative appraisal of all the factors in the case, including the following primary factors:

- The nature of the interest to be protected.
- The relative adequacy of injunctive and other remedies available to the plaintiff.
- Any unreasonable delay of the plaintiff in initiating the action.
- Any related misconduct on the part of the plaintiff.
- The relative hardship to the parties if the injunction is granted or denied.
- The interests of the third persons and the public.
- The practicability of framing and enforcing the injunction.<sup>1</sup>

#### Observation:

Where the encroachment of a trespass is minimal and the cost of removing the encroachment is most likely substantial, two competing factors must be considered in fashioning a remedy: on one hand, without court intervention, a defendant may be forced to buy the plaintiff's land at a price many times its worth rather than destroy the building that encroaches; on the other hand, without the threat of a mandatory injunction, builders may view the legal remedy as a license to engage in private eminent domain.<sup>2</sup>

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#### Footnotes

- 1 [Restatement Second, Torts § 936\(1\)\(a\) to \(g\).](#)  
The equities did not warrant a grant of a mandatory injunction requiring the removal of a rebuilt barn on adjacent property, which encroached on the property by one foot, and compliance with setback regulations, and rather, an award of \$100 in damages for trespass was the appropriate remedy where a building inspector had mistakenly approved the construction of the barn and was surprised to later discover the encroachment, the owners of the adjacent property neither knew or should have known of the encroachment when the barn was rebuilt, the cost of removing the barn would be prohibitive, and the owners of adjacent property admitted that actual damages were minimal. [Hanson v. Estell](#), 100 Wash. App. 281, 997 P.2d 426 (Div. 3 2000).  
A trial court erred in denying a surface owner's request for a permanent injunction to prevent an oil-exploration company's continued use of a road it had wrongfully located on her land contrary to the location designated in the right-of-way agreement, even though damages were sufficient to compensate her for the portion of the road that was wrongfully located, where money damages could not compensate her for continued trespass by the unauthorized use of the road, which invaded her interest in the exclusive possession of her land. [Angier v. Mathews Exploration Corp.](#), 1995 OK CIV APP 109, 905 P.2d 826 (Ct. App. Div. 3 1995).
- 2 [Williams v. South & South Rentals, Inc.](#), 82 N.C. App. 378, 346 S.E.2d 665 (1986).

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## 75 Am. Jur. 2d Trespass § 93

American Jurisprudence, Second Edition | May 2021 Update

### Trespass

Eric C. Surette, J.D.

#### V. Remedies; Damages

##### A. In General

##### 2. Remedy for Continuing Trespass

## § 93. Successive actions based on continuing trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  16, 17

Trespass is a continuous tort giving rise to successive causes of action until the trespass has ended.<sup>1</sup> In other words, a continuing trespass gives rise to successive causes of action each time there is an interference with a person's property; thus, if there are multiple acts of trespass, then there are multiple causes of action.<sup>2</sup> However, it also has been stated that damages for a continuing trespass must be sought in one action and not in successive causes of action for continuing trespass.<sup>3</sup>

### Practice Tip:

If a trespass is continuing, any person in possession of the land at any time during its continuance may maintain an action for trespass.<sup>4</sup>

## CUMULATIVE SUPPLEMENT

**Cases:**

Under Colorado law, a continuing trespass is a tort that gives rise to its own cause of action; a continuing trespass does not in and of itself affect title, rather, it affects title only if it somehow alters interests in the land. [Cherry Hills Farm Court, LLC v. First American Title Insurance Company](#), 428 F. Supp. 3d 516 (D. Colo. 2019).

**[END OF SUPPLEMENT]**

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Footnotes

- 1 [Gaetan v. Weber](#), 729 A.2d 895 (D.C. 1999).  
A "trespasser" is under a continuing duty to remove the intrusive substance or condition; thus, sequential causes of action for continuing trespass persist until the intruding substance is removed. [Wallace v. Lewis County](#), 134 Wash. App. 1, 137 P.3d 101 (Div. 2 2006), as corrected, (Aug. 15, 2006).  
As to continuing trespass and limitation of actions, see §§ 176 to 179.
- 2 [Cal Sierra Development, Inc. v. George Reed, Inc.](#), 14 Cal. App. 5th 663, 223 Cal. Rptr. 3d 506 (3d Dist. 2017); [Rickel v. Komaromi](#), 144 Conn. App. 775, 73 A.3d 851 (2013); [Daniel v. Morris](#), 181 So. 3d 1195 (Fla. 5th DCA 2015).
- 3 [Williams v. South & South Rentals, Inc.](#), 82 N.C. App. 378, 346 S.E.2d 665 (1986).
- 4 [Rosenthal v. City of Crystal Lake](#), 171 Ill. App. 3d 428, 121 Ill. Dec. 869, 525 N.E.2d 1176 (2d Dist. 1988).

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## 75 Am. Jur. 2d Trespass § 94

American Jurisprudence, Second Edition | May 2021 Update

### Trespass

Eric C. Surette, J.D.

#### V. Remedies; Damages

##### A. In General

##### 2. Remedy for Continuing Trespass

## § 94. Removal of encroaching structure or forced sale

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  [16](#), [17](#)

### A.L.R. Library

[Power of Court to Order Land Owner to Sell Land to Another If Other's Structures Encroach on Land](#), 29 A.L.R. 7th Art. 11

Although a mandatory injunction requiring a trespasser to remove encroaching structures is the ordinary remedy for continuing trespass, it is not to be issued as a matter of course.<sup>1</sup> Because there is no specific and universally accepted rule about the kind of remedy a court should impose in continuing trespass cases involving improvements to real property, the court must consider the peculiar circumstances of each encroachment case to determine whether removal of the improvements or damages is the more appropriate remedy.<sup>2</sup> If a person erects an encroaching structure with the intention of taking another's land, equity may well require restoring the land to the other person without regard to the expense of removal as compared with the damage suffered therefrom, but if the encroachment occurs in good faith, a court should consider the relative hardships that each party will face so that it shall not act oppressively.<sup>3</sup> A sale of the property can be a proper remedy in the appropriate case.<sup>4</sup> A fair and just remedy for a landowner, whose parcel is partially encroached upon by adjoining neighbors who construct a structure on a portion of the landowner's parcel based on the parties' good-faith surveying mistake, may be to require the neighbors to purchase the portion of the parcel that they encroached upon, rather than issuing a mandatory injunction to force the neighbors to remove the encroachments and reconstruct the improvements on their own property.<sup>5</sup>

**Observation:**

A forced sale of land by a neighbor to an adjoining owner who has unknowingly built improvements on the adjoining land under a statute on forced sales, or under its general powers of equity, are both discretionary decisions in which a court determines whether the equities of the situation call for a forced sale.<sup>6</sup>

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**Footnotes**

- 1 [Graham v. Jules Investment, Inc., 2014 COA 136, 356 P.3d 986 \(Colo. App. 2014\).](#)
- 2 [Graham v. Jules Investment, Inc., 2014 COA 136, 356 P.3d 986 \(Colo. App. 2014\).](#)
- 3 [Graham v. Jules Investment, Inc., 2014 COA 136, 356 P.3d 986 \(Colo. App. 2014\).](#)
- 4 [Graham v. Jules Investment, Inc., 2014 COA 136, 356 P.3d 986 \(Colo. App. 2014\).](#)
- 5 [Proctor v. Huntington, 169 Wash. 2d 491, 238 P.3d 1117 \(2010\).](#)
- 6 [Soma v. Zurawski, 2009 WI App 124, 321 Wis. 2d 91, 772 N.W.2d 724 \(Ct. App. 2009\).](#)

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## 75 Am. Jur. 2d Trespass V B Refs.

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  [22](#) to [25](#), [47](#) to [52](#), [55](#) to [61](#), [67](#) to [69](#)

#### A.L.R. Library

A.L.R. Index, Consequential Damages

A.L.R. Index, Damages

A.L.R. Index, Intentional, Wilful, and Wanton Acts

A.L.R. Index, Joint Tortfeasors

A.L.R. Index, Loss of Enjoyment or Use

A.L.R. Index, Multiple Damages

A.L.R. Index, Nominal Damages

A.L.R. Index, Property Damage

A.L.R. Index, Punitive Damages

A.L.R. Index, Restatement of Torts

A.L.R. Index, Trespass

West's A.L.R. Digest, [Trespass](#)  [22](#) to [25](#), [47](#) to [52](#), [55](#) to [61](#), [67](#) to [69](#)

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## 75 Am. Jur. 2d Trespass § 95

American Jurisprudence, Second Edition | May 2021 Update

### Trespass

Eric C. Surette, J.D.

#### V. Remedies; Damages

##### B. Damages

###### 1. In General

### § 95. Damages recoverable for trespass, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  47

From every unlawful entry,<sup>1</sup> or every direct invasion of the person or property of another, the law infers some damage<sup>2</sup> and a plaintiff may also assert a claim for whatever damages the facts may lawfully warrant.<sup>3</sup> Compensation for damage to personal property occurring during a trespass is recoverable in a trespass action.<sup>4</sup>

#### Observation:

The purpose of a compensatory damage award for trespass is to compensate the owner for the injury received.<sup>5</sup>

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#### Footnotes

<sup>1</sup> [Morrison v. Smith](#), 757 S.W.2d 678 (Tenn. Ct. App. 1988).

2 Longenecker v. Zimmerman, 175 Kan. 719, 267 P.2d 543 (1954); Pearl v. Pic Walsh Freight Co., 112 Ohio  
App. 11, 15 Ohio Op. 2d 338, 168 N.E.2d 571 (1st Dist. Hamilton County 1960); Hawkins v. Schroeter, 212  
S.W.2d 843 (Tex. Civ. App. San Antonio 1948).

When a trespass is found, the claiming party is entitled to damages. Shapiro Bros., Inc. v. Jones-Festus  
Properties, L.L.C, 205 S.W.3d 270 (Mo. Ct. App. E.D. 2006).

3 Pinkowski v. Township of Montclair, 299 N.J. Super. 557, 691 A.2d 837 (App. Div. 1997).

4 Webb v. Knology, Inc., 164 So. 3d 613 (Ala. Civ. App. 2014).

5 Miloszar v. Gonzalez, 619 S.W.2d 283 (Tex. Civ. App. Corpus Christi 1981).

An award of damages in an action for trespass is intended to compensate an injured party for the wrong done  
to him or her; the goal is to place that injured party as nearly as reasonably possible in the same position  
he or she would have been in had the injury not been inflicted. Rodrian v. Seiber, 194 Ill. App. 3d 504, 141  
Ill. Dec. 585, 551 N.E.2d 772 (5th Dist. 1990).

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## 75 Am. Jur. 2d Trespass § 96

American Jurisprudence, Second Edition | May 2021 Update

### Trespass

Eric C. Surette, J.D.

#### V. Remedies; Damages

##### B. Damages

###### 1. In General

### § 96. Assessment and review of damages for trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  58, 69

No precise rule for ascertaining damage can be given and therefore the jury are left to say what, in their judgment, the defendant ought to pay.<sup>1</sup> In other words, the assessment of damages, where the damages are shown by competent evidence, is within the sound discretion of the jury, and those damages, once assessed, are presumed correct,<sup>2</sup> particularly where the award is not so unreasonable or so disproportionate to the value of the land, in light of the harm done, to justify reversal.<sup>3</sup> Notwithstanding the sufficiency of the evidence given by the plaintiff as to the value of damages suffered as a result of trespass, to allow the question to go to the jury, the jurors need not accept the plaintiff's assessment of the diminution in the value of the property and may adopt a substantially lower assessment.<sup>4</sup>

#### Observation:

To determine what damages, if any, are recoverable for a trespass, the type of conduct or nature of the activity causing the entry must be identified; while a trespass is a trespass, different recoveries are available depending on whether the trespass was committed intentionally, negligently, accidentally, or by an abnormally dangerous activity.<sup>5</sup>

Adaptability of the property for a special purpose affecting its value is an element for the consideration of the jury in assessing damages in an action for trespass.<sup>6</sup>

A trial court similarly has much discretion, based upon all the facts and circumstances, in the assessment of damages arising out of trespass.<sup>7</sup>

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#### Footnotes

- 1 [Lanier v. Burnette](#), 245 Ga. App. 566, 538 S.E.2d 476 (2000).
- 2 [Hollis v. Wyrosdick](#), 508 So. 2d 704 (Ala. 1987); [Statler v. Catalano](#), 167 Ill. App. 3d 397, 118 Ill. Dec. 283, 521 N.E.2d 565 (5th Dist. 1988); [Currier v. Cyr](#), 570 A.2d 1205 (Me. 1990).
- 3 [Rodrian v. Seiber](#), 194 Ill. App. 3d 504, 141 Ill. Dec. 585, 551 N.E.2d 772 (5th Dist. 1990).
- 4 [Ingram v. Summerlin](#), 179 Ga. App. 832, 348 S.E.2d 68 (1986).  
As to diminution in value of real estate, generally, see §§ 106 to 109.
- 5 [XTO Energy Inc. v. Goodwin](#), 2017 WL 4675136 (Tex. App. Tyler 2017), petition for review filed, (Jan. 16, 2018).
- 6 [Borland v. Sanders Lead Co., Inc.](#), 369 So. 2d 523, 2 A.L.R.4th 1042 (Ala. 1979) (harmful emissions of lead particulate matter onto the plaintiff's property).
- 7 [Ardoin v. State, Dept. of Transp. & Development](#), 679 So. 2d 928 (La. Ct. App. 3d Cir. 1996), writ denied, 682 So. 2d 775 (La. 1996).

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## 75 Am. Jur. 2d Trespass § 97

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### Trespass

Eric C. Surette, J.D.

#### V. Remedies; Damages

##### B. Damages

###### 1. In General

### § 97. Assessment and review of damages for trespass— Effect of finding of trespass without award of damages

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  58, 69

A jury verdict finding that there was a trespass but no damages, either nominal or compensatory, is invalid and incomplete so that the judgment based thereon must be considered a nullity.<sup>1</sup>

Another view is that it is possible for the jury to find that a trespass was committed but to award no damages for the trespass where it was nondeliberate and caused no actual damage.<sup>2</sup> Thus nominal damages need not be awarded where no actual loss has occurred.<sup>3</sup>

#### Observation:

A number of jurisdictions have adopted the "modern view" that when the trespass is nondeliberate or unintentional, damages need not be awarded where the trespass causes no injury.<sup>4</sup>



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Footnotes

- 1 [Costerisan v. Tejon Ranch Co.](#), 255 Cal. App. 2d 57, 62 Cal. Rptr. 800 (5th Dist. 1967).  
As to entitlement to actual damages, see § 114.  
As to entitlement to nominal damages, see § 115.
- 2 [Wernberg v. Matanuska Elec. Ass'n](#), 494 P.2d 790 (Alaska 1972).
- 3 [Staples v. Hoefke](#), 189 Cal. App. 3d 1397, 235 Cal. Rptr. 165 (2d Dist. 1987).
- 4 [Borland v. Sanders Lead Co., Inc.](#), 369 So. 2d 523, 2 A.L.R.4th 1042 (Ala. 1979) (the court refusing to accept the so-called modern view).

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## 75 Am. Jur. 2d Trespass § 98

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### Trespass

Eric C. Surette, J.D.

#### V. Remedies; Damages


##### B. Damages

###### 1. In General

### § 98. Effect of mistaken belief in authority to enter property on assessment of damages

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  22 to 25

Although, generally, neither a mistake of law or fact nor the absence of bad faith on the part of the defendant will excuse a trespass, at common law, an honest and reasonable belief in the existence of circumstances which, if true, would have made the trespass innocent is a good defense.<sup>1</sup> Thus an act which, as related to the true owner of land, might appear to be a trespass is not in fact a trespass if the act is committed in good faith by one who actually and sincerely believes that he or she is authorized to do the act in question.<sup>2</sup>

A bona fide claim of right is a sincere, although perhaps mistaken, good-faith belief that one has some legal right to be on the property; the claim need not one of title or ownership, but it must rise to the level of authorization.<sup>3</sup>

#### Observation:

Where a trespass statute awards single damages where the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own, or that of a person in whose service or by whose direction the act was done, probable cause means an honest and reasonable belief; a negligent mistake as to authority cannot qualify as probable cause because negligence involves unreasonable conduct.<sup>4</sup>

Subjective reasons for a defendant to be on the property of another, not related to a claimed property right or permission, are irrelevant and immaterial to the issue of a claim of right.<sup>5</sup>

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#### Footnotes

- 1 [Warfield v. State](#), 315 Md. 474, 554 A.2d 1238 (1989).
- 2 [Bowman v. State](#), 258 Ga. 829, 376 S.E.2d 187 (1989).
- 3 [Reed v. Com.](#), 6 Va. App. 65, 366 S.E.2d 274 (1988).
- 4 [Matanuska Elec. Ass'n, Inc. v. Weissler](#), 723 P.2d 600 (Alaska 1986).
- 5 [State v. Scholberg](#), 395 N.W.2d 454 (Minn. Ct. App. 1986).

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## 75 Am. Jur. 2d Trespass § 99

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### Trespass

Eric C. Surette, J.D.

#### V. Remedies; Damages

##### B. Damages

##### 2. Measure of Damages

###### a. In General

### § 99. Measure of damages for injury to property and persons caused by trespass, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  57

There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property resulting from a trespass.<sup>1</sup> The measure of damages differs according to the nature of the injury.<sup>2</sup> Whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case will be adopted.<sup>3</sup>

A trespasser is liable for all damages proximately caused by his or her trespass.<sup>4</sup> Damages for the dispossession of property are regarded as an award of compensatory damages for the violation of a recognized property right and encompass more than actual pecuniary loss.<sup>5</sup>

It has also been held that the proper measure of the damages for trespass is the gain the trespasser has derived from its wrongful conduct.<sup>6</sup>

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#### Footnotes

- <sup>1</sup> [Armitage v. Decker](#), 218 Cal. App. 3d 887, 267 Cal. Rptr. 399 (1st Dist. 1990).
- <sup>2</sup> [Denke v. Mamola](#), 437 N.W.2d 205 (S.D. 1989).
- <sup>3</sup> [Armitage v. Decker](#), 218 Cal. App. 3d 887, 267 Cal. Rptr. 399 (1st Dist. 1990).
- <sup>4</sup> [Baker v. Ramirez](#), 190 Cal. App. 3d 1123, 235 Cal. Rptr. 857 (5th Dist. 1987); [Brand v. Mathis & Associates](#), 15 S.W.3d 403 (Mo. Ct. App. S.D. 2000).

5 Owens v. Smith, 541 So. 2d 950 (La. Ct. App. 2d Cir. 1989).

6 Sakele Brothers, LLC v. Safdie, 302 A.D.2d 20, 752 N.Y.S.2d 626 (1st Dep't 2002).

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## 75 Am. Jur. 2d Trespass § 100

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

##### 2. Measure of Damages

###### a. In General

### § 100. Significance of injury as permanent or temporary; continuing trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  57

#### A.L.R. Library

[Measure of damages for wrongful removal of earth, sand, or gravel from land, 1 A.L.R.3d 801](#)

The measure of damages to be awarded for an injury resulting from a trespass depends upon whether the injury is permanent or temporary.<sup>1</sup>

A continuing trespass can cause temporary harm, permanent harm, or both.<sup>2</sup> A proper measure of damages for a continuing trespass to land is the reasonable rental value of that land during the period of trespass.<sup>3</sup> Prospective damages are unavailable when the injury from nuisance of trespass is continuous, and recovery is limited to actual injury suffered prior to the commencement of each action.<sup>4</sup>

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#### Footnotes

- 1 [Borland v. Sanders Lead Co., Inc.](#), 369 So. 2d 523, 2 A.L.R.4th 1042 (Ala. 1979); [Moore v. Rotello](#), 719 S.W.2d 372 (Tex. App. Houston 14th Dist. 1986), writ refused n.r.e., (Jan. 21, 1987).
- 2 [Taygeta Corp. v. Varian Associates, Inc.](#), 436 Mass. 217, 763 N.E.2d 1053 (2002); [Walker Drug Co., Inc. v. La Sal Oil Co.](#), 972 P.2d 1238 (Utah 1998).
- 3 As to remedy for continuing trespass, generally, see §§ 92, 93, 116.
- 4 [In re Minnwest Bank Litigation Concerning Real Property](#), 873 N.W.2d 135 (Minn. Ct. App. 2015).
- [Christian v. Atlantic Richfield Co.](#), 2015 MT 255, 380 Mont. 495, 358 P.3d 131 (2015).

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## 75 Am. Jur. 2d Trespass § 101

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

##### 2. Measure of Damages

###### a. In General

### § 101. Significance of injury as permanent or temporary; continuing trespass—Measure of permanent injury

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  57

Whenever the injury resulting from a trespass is deemed to be permanent, the measure of damages is the decrease in the fair market value of the property,<sup>1</sup> except where there is a total destruction, in which case the owner is entitled to recover the entire value.<sup>2</sup> Damages for permanent trespass are limited to the full market value of the property.<sup>3</sup>

When damages for a permanent trespass are assessed once and for all in a single action, then the plaintiff will be permitted to recover both past and prospective damages.<sup>4</sup>

#### Observation:

On the theory that an award of monetary damages for a permanent encroachment on real property is tantamount to a condemnation by a private citizen without the right of eminent domain, courts have permitted permanent monetary damages only in situations involving a trespass by quasi-public entities, such as a telegraph company.<sup>5</sup>



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#### Footnotes

- 1 [Stevenson v. E.I. DuPont De Nemours and Co.](#), 327 F.3d 400, 60 Fed. R. Evid. Serv. 1521 (5th Cir. 2003); [In re Minnwest Bank Litigation Concerning Real Property](#), 873 N.W.2d 135 (Minn. Ct. App. 2015); [Arcamone-Makinano v. Britton Property, Inc.](#), 156 A.D.3d 669, 67 N.Y.S.3d 290 (2d Dep't 2017), leave to appeal denied, 31 N.Y.3d 907, 2018 WL 2122422 (2018).
- 2 [Hughett v. Caldwell County](#), 313 Ky. 85, 230 S.W.2d 92, 21 A.L.R.2d 373 (1950) (abrogated on other grounds by, [Harrod Concrete and Stone Co. v. Crutcher](#), 458 S.W.3d 290 (Ky. 2015)); [Hostler v. Green Park Development Co.](#), 986 S.W.2d 500 (Mo. Ct. App. E.D. 1999) (total destruction of land).
- 3 [Babb v. Lee County Landfill SC, LLC](#), 405 S.C. 129, 747 S.E.2d 468 (2013).
- 4 [Christian v. Atlantic Richfield Co.](#), 2015 MT 255, 380 Mont. 495, 358 P.3d 131 (2015).
- 5 [Williams v. South & South Rentals, Inc.](#), 82 N.C. App. 378, 346 S.E.2d 665 (1986).

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## 75 Am. Jur. 2d Trespass § 102

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

##### 2. Measure of Damages

###### a. In General

### § 102. Significance of injury as permanent or temporary; continuing trespass—Measure of temporary damages

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  57

An injury that would cease to exist once remediation or restoration has been completed qualifies as temporary.<sup>1</sup> Recovery for temporary trespass is limited to the amount necessary to place the owner of the property in the same position he or she occupied prior to the injury.<sup>2</sup> More specifically, damages for a temporary invasion or trespass are the cost of restoration and the loss of use.<sup>3</sup> In addition to the cost of restoration and the loss of use, nominal damages may also be available for a temporary invasion or trespass.<sup>4</sup>

#### Practice Tip:

Under some authority, where the trespass is temporary in character, only those damages may be recovered which have accrued up to the time of the commencement of the action, since it is not to be presumed that the trespass will continue.<sup>5</sup>

Footnotes

- 1 [Lampi v. Speed](#), 2011 MT 231, 362 Mont. 122, 261 P.3d 1000 (2011).  
A "temporary injury," for purposes of determining the appropriate measure of damages for an injury resulting from a trespass, is one which may be abated or discontinued at any time. [Argentinis v. Fortuna](#), 134 Conn. App. 538, 39 A.3d 1207 (2012).
- 2 [Stevenson v. E.I. DuPont De Nemours and Co.](#), 327 F.3d 400, 60 Fed. R. Evid. Serv. 1521 (5th Cir. 2003).
- 3 [Hall v. Lovell Regency Homes Ltd. Partnership](#), 121 Md. App. 1, 708 A.2d 344 (1998); [Lampi v. Speed](#), 2011 MT 231, 362 Mont. 122, 261 P.3d 1000 (2011); [Vaughn v. Drennon](#), 372 S.W.3d 726 (Tex. App. Tyler 2012); [Olympic Pipe Line Co. v. Thoeny](#), 124 Wash. App. 381, 101 P.3d 430 (Div. 2 2004).  
In an action for temporary injury to land, an owner is entitled to recover the amount necessary to repair the injury and put the land in the condition it was at the time immediately preceding the injury. [Powell v. Sellers](#), 130 Idaho 122, 937 P.2d 434 (Ct. App. 1997).
- 4 [Olympic Pipe Line Co. v. Thoeny](#), 124 Wash. App. 381, 101 P.3d 430 (Div. 2 2004).  
As to nominal damages, generally, see § 115.
- 5 [Argentinis v. Fortuna](#), 134 Conn. App. 538, 39 A.3d 1207 (2012).

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## 75 Am. Jur. 2d Trespass § 103

American Jurisprudence, Second Edition | May 2021 Update

### Trespass

Eric C. Surette, J.D.

#### V. Remedies; Damages

##### B. Damages

##### 2. Measure of Damages

##### b. Damage to Real Property

##### (1) In General

## § 103. Damage to real property from trespass, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  50, 51

### Trial Strategy

[Damages for Injury to Real Property](#), 121 Am. Jur. Proof of Facts 3d 359

A court may award monetary damages to a property owner where a trespass has caused damage to the party's property;<sup>1</sup> the measure of damages for tortious injury to real property is the amount which will compensate for all the detriment proximately caused thereby,<sup>2</sup> considered in relation to the particular purpose for which the property is used,<sup>3</sup> and computed not merely with reference to the portion injured but also to the effect of the injury on the whole parcel.<sup>4</sup>

Damages available on trespass claims can include not only diminution of market value, costs of restoration,<sup>5</sup> and loss of use of the property<sup>6</sup> but also discomfort and annoyance to the property owner as the occupant.<sup>7</sup> In a proper case damages can include expert and attorney's fees.<sup>8</sup>

Those who use another's land without permission may justifiably have "risks of losses" allocated to them far beyond those normally imposed when liability is imposed on a negligence theory; under the law of some jurisdictions, the consequences flowing from an intentional tort such as a trespass may include emotional distress even without a physical injury to the person or to the land.<sup>9</sup>

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Footnotes

- 1 Neuse River Foundation, Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 574 S.E.2d 48 (2002).
- 2 Hammond v. County of Madera, 859 F.2d 797 (9th Cir. 1988); Armitage v. Decker, 218 Cal. App. 3d 887, 267 Cal. Rptr. 399 (1st Dist. 1990).
- 3 Borland v. Sanders Lead Co., Inc., 369 So. 2d 523, 2 A.L.R.4th 1042 (Ala. 1979); Salesian Soc., Inc. v. Village of Ellenville, 121 A.D.2d 823, 505 N.Y.S.2d 197 (3d Dep't 1986).
- 4 Waggener v. Leggett, 246 Miss. 505, 150 So. 2d 529 (1963).
- 5 Trask v. Nozisko, 134 P.3d 544 (Colo. App. 2006).  
As to diminution of value, see §§ 109 to 134.  
As to cost of restoration or repair, see §§ 110, 111.
- 6 Trask v. Nozisko, 134 P.3d 544 (Colo. App. 2006); Durkin Village Plainville, LLC v. Cunningham, 97 Conn. App. 640, 905 A.2d 1256 (2006); Vaughn v. Drennon, 372 S.W.3d 726 (Tex. App. Tyler 2012).  
Generally, as to a lessee of real property, the proper measure of damages for trespass includes the lessee's loss of use and enjoyment of the land. Coddington v. Staab, 716 So. 2d 850 (Fla. 4th DCA 1998).
- 7 Trask v. Nozisko, 134 P.3d 544 (Colo. App. 2006); Christian v. Atlantic Richfield Co., 2015 MT 255, 380 Mont. 495, 358 P.3d 131 (2015).
- 8 Dobbs v. Crawford, 177 So. 3d 448 (Miss. Ct. App. 2015).
- 9 Miller v. National Broadcasting Co., 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668, 69 A.L.R.4th 1027 (2d Dist. 1986).

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## 75 Am. Jur. 2d Trespass § 104

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

##### 2. Measure of Damages

##### b. Damage to Real Property

##### (1) In General

## § 104. Determination of applicable measure of damages to real property for trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  50, 51

The measure of damages for a trespass to realty depends on that criterion which will best accomplish the goal of compensating the owner for the injury received.<sup>1</sup>

### Observation:

Regardless which measure of damages a court applies, such rules serve as guidelines only and are not to be applied in an arbitrary, formulaic, or inflexible manner in every instance so as to deprive an injured party of just compensation for a trespass to real property.<sup>2</sup> There is no one fixed, inflexible rule for determining the appropriate sum, and courts are to apply whatever approach is most appropriate to compensate for the loss incurred.<sup>3</sup>

Generally, the proper measure of damages for trespass is the difference in value of the plaintiff's property immediately before and immediately after trespass or the cost of restoration, whichever is less,<sup>4</sup> with the plaintiff bearing the burden to prove one or the other.<sup>5</sup>

When improvements to land are made by a good-faith trespasser, the injured party is entitled, in effect, to the trespasser's net profits, that is, the revenues generated upon the land less the moneys expended in facilitating the profitable activity.<sup>6</sup> When a party trespasses in bad faith, the injured party is entitled to all moneys derived from the trespass without any offset for the cost of generating those moneys.<sup>7</sup>

The amount of damages to which an injured property owner is entitled as a result of trespass involving the conversion of natural resources is dependent upon whether the trespass was innocent or willful; damages provided under the latter category reflect the punitive conversion measure once embraced in all cases without exception while, in contrast, damages resulting from an innocent trespass attempt to make the injured party whole without unjustly penalizing good-faith trespassers.<sup>8</sup> For purposes of the difference in the measure of damages for trespass involving conversion of natural resources depending on whether the trespass is innocent or willful, conduct that is inadvertent or the result of an honest mistake constitutes an innocent trespass.<sup>9</sup>

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#### Footnotes

- 1 [Miloszar v. Gonzalez](#), 619 S.W.2d 283 (Tex. Civ. App. Corpus Christi 1981).
- 2 [Rodrian v. Seiber](#), 194 Ill. App. 3d 504, 141 Ill. Dec. 585, 551 N.E.2d 772 (5th Dist. 1990).
- 3 [Szymanski v. Brown](#), 221 Mich. App. 423, 562 N.W.2d 212 (1997).
- 4 [Newmark v. Vogelgesang](#), 915 S.W.2d 337 (Mo. Ct. App. E.D. 1996); [McDermott v. City of Albany](#), 309 A.D.2d 1004, 765 N.Y.S.2d 903 (3d Dep't 2003).  
As to diminution of value, see §§ 106 to 109.  
As to cost of restoration or repair, see §§ 110, 111.
- 5 [McDermott v. City of Albany](#), 309 A.D.2d 1004, 765 N.Y.S.2d 903 (3d Dep't 2003).
- 6 [Sabella v. Appalachian Development Corp.](#), 2014 PA Super 237, 103 A.3d 83 (2014).
- 7 [Sabella v. Appalachian Development Corp.](#), 2014 PA Super 237, 103 A.3d 83 (2014).
- 8 [Harrod Concrete and Stone Co. v. Crutcher](#), 458 S.W.3d 290 (Ky. 2015).
- 9 [Harrod Concrete and Stone Co. v. Crutcher](#), 458 S.W.3d 290 (Ky. 2015).

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## 75 Am. Jur. 2d Trespass § 105

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### Trespass

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#### V. Remedies; Damages

#### B. Damages

#### 2. Measure of Damages

#### b. Damage to Real Property

#### (1) In General

### § 105. Determination of applicable measure of damages to real property for trespass—Plaintiff's election

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  50, 51

A plaintiff may be allowed to elect between recovering, for trespass to land, the difference in value caused by the damage or the reasonable cost of repair or restoration where feasible.<sup>1</sup> Because the elements of harm as measured for an award of damages, that is, the difference in the value of the land before and after the harm, the loss of the use of the land, and the discomfort and annoyance to the plaintiff are disjunctive, a plaintiff can elect to collect for one or more elements of damage.<sup>2</sup>

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#### Footnotes

- <sup>1</sup> [Airtech Service, Inc. v. MacDonald Const. Co.](#), 150 So. 2d 465 (Fla. 3d DCA 1963).  
If a property owner is entitled to a judgment for harm to land resulting from a past invasion, and not amounting to a total destruction of value, the damages include compensation, at the plaintiff's election in an appropriate case, for the difference between the value of the land before and after the trespass or for the cost of restoration that has been or may reasonably be incurred. [Restatement Second, Torts § 929\(1\)\(a\)](#).
- <sup>2</sup> [Statler v. Catalano](#), 167 Ill. App. 3d 397, 118 Ill. Dec. 283, 521 N.E.2d 565 (5th Dist. 1988).

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## 75 Am. Jur. 2d Trespass § 106

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

##### 2. Measure of Damages


##### b. Damage to Real Property

##### (2) Diminution in Value

### § 106. Diminution in value as measure of damages for trespass, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  50, 51

#### Trial Strategy

[Diminished Property Value Due to Environmental Contamination](#), 33 Am. Jur. Proof of Facts 3d 163

The common law permits the remedy of diminution in value for intentional trespass.<sup>1</sup> The usual measure of damages in trespass cases, or at least one such measure,<sup>2</sup> is the difference between the value before and after the trespass<sup>3</sup> or the fair market value before and after the trespass.<sup>4</sup>

#### Observation:

Inasmuch as the purpose of a damage award is to make the plaintiff whole, compensating plaintiffs for the decline in the value of their property resulting from the defendant's trespass accomplishes such a purpose.<sup>5</sup>

Even where there is a total diminution in value, the plaintiff may not recover more than the preinjury value of the land.<sup>6</sup>

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Footnotes

- 1 [Caciopoli v. Lebowitz](#), 131 Conn. App. 306, 26 A.3d 136 (2011), judgment *aff'd*, 309 Conn. 62, 68 A.3d 1150 (2013).
- 2 [Baker v. Ramirez](#), 190 Cal. App. 3d 1123, 235 Cal. Rptr. 857 (5th Dist. 1987).
- 3 [Armitage v. Decker](#), 218 Cal. App. 3d 887, 267 Cal. Rptr. 399 (1st Dist. 1990); [Currier v. Cyr](#), 570 A.2d 1205 (Me. 1990) (by implication); [Teasley v. Buford](#), 876 So. 2d 1070 (Miss. Ct. App. 2004); [Hostler v. Green Park Development Co.](#), 986 S.W.2d 500 (Mo. Ct. App. E.D. 1999); [Denke v. Mamola](#), 437 N.W.2d 205 (S.D. 1989); [Henderson v. For-Shor Co.](#), 757 P.2d 465 (Utah Ct. App. 1988).  
If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for the difference between the value of the land before the harm and the value after the harm. [Restatement Second, Torts § 929\(1\)\(a\)](#).
- 4 [Garner v. Kent Excavation, Inc.](#), 532 So. 2d 1033 (Ala. Civ. App. 1988); [MDC Blackshear, LLC v. Littell](#), 273 Ga. 169, 537 S.E.2d 356 (2000); [Rodrian v. Seiber](#), 194 Ill. App. 3d 504, 141 Ill. Dec. 585, 551 N.E.2d 772 (5th Dist. 1990); [Taylor v. Hanson](#), 541 A.2d 155 (Me. 1988); [Waste Disposal Center, Inc. v. Larson](#), 74 S.W.3d 578 (Tex. App. Corpus Christi 2002).
- 5 [Markstrom v. U.S. Steel Corp.](#), 182 Mich. App. 570, 452 N.W.2d 820 (1989), judgment *rev'd* on other grounds, 437 Mich. 936, 467 N.W.2d 310 (1991).
- 6 [Armitage v. Decker](#), 218 Cal. App. 3d 887, 267 Cal. Rptr. 399 (1st Dist. 1990).

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## 75 Am. Jur. 2d Trespass § 107

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

##### 2. Measure of Damages


##### b. Damage to Real Property

##### (2) Diminution in Value

## § 107. Factors in determining diminished value of land after trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  [50](#), [51](#)

Where the measure of damages in trespass cases is the difference between the value of the land before and after the trespass, the value is not determined based on the best and highest use of the property but on the owner's desired or previous use of it.<sup>1</sup> Where the wrongful possessor has improved the land, the real value charged should be for the land in its previous unimproved state.<sup>2</sup>

A delay in the receipt of the proceeds from a pending sale of the realty and a consequent loss of interest on those proceeds, although resulting from a trespass, does not come within the measure of diminution of value.<sup>3</sup>

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### Footnotes

<sup>1</sup> [Borland v. Sanders Lead Co., Inc.](#), 369 So. 2d 523, 2 A.L.R.4th 1042 (Ala. 1979).

<sup>2</sup> [Uhlhorn v. Keltner](#), 723 S.W.2d 131 (Tenn. Ct. App. 1986).

<sup>3</sup> [Kirchoff v. Moulder Bros., Inc.](#), 391 So. 2d 347 (Fla. 5th DCA 1980).

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## 75 Am. Jur. 2d Trespass § 108

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

##### 2. Measure of Damages

##### b. Damage to Real Property

##### (2) Diminution in Value

### § 108. Factors in determining diminished value of land after trespass—Loss of rental or usable value

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  50, 51

Whenever a harm to land occurs from an invasion of property rights, the elements of damage to be considered include the loss of the use of the land.<sup>1</sup> Thus where the trespass puts the plaintiff out of possession of the land, the measure of damages is the amount that would compensate for its use and occupation, that is, the fair rental value,<sup>2</sup> the reasonable value of the use of the property during the time the plaintiff is deprived thereof,<sup>3</sup> or any diminution in the rental value of the property.<sup>4</sup>

The proper measure of damages in a trespass action is the rental value of the area actually occupied by the trespasser.<sup>5</sup>

In cases where the trespass is to a portion of the property, as where the trespasser establishes a road on the plaintiff's property without acquiring the proper right-of-way, the reasonable rental value is the appropriate measure of damage for the trespass.<sup>6</sup>

A defendant who has beneficially occupied the plaintiff's property may be liable for its fair rental value, even though the plaintiff was not hindered or obstructed in any use which he or she expected to make of the property.<sup>7</sup>

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#### Footnotes

- 1 Statler v. Catalano, 167 Ill. App. 3d 397, 118 Ill. Dec. 283, 521 N.E.2d 565 (5th Dist. 1988).
- 2 Babb v. Lee County Landfill SC, LLC, 405 S.C. 129, 747 S.E.2d 468 (2013); Enbridge Energy, Ltd. Partnership v. Engelking, 2017 WI App 1, 372 Wis. 2d 833, 890 N.W.2d 48 (Ct. App. 2016), review denied, 2017 WI 47, 375 Wis. 2d 130, 898 N.W.2d 583 (2017).
- 3 The owner of the subject matter is entitled to recover as damages for the loss of the value of the use, at least the rental value of the land during the period of deprivation. *Restatement Second, Torts* § 931, comment b. Borland v. Sanders Lead Co., Inc., 369 So. 2d 523, 2 A.L.R.4th 1042 (Ala. 1979); Pearl v. Pic Walsh Freight Co., 112 Ohio App. 11, 15 Ohio Op. 2d 338, 168 N.E.2d 571 (1st Dist. Hamilton County 1960); Uhlhorn v. Keltner, 723 S.W.2d 131 (Tenn. Ct. App. 1986); Southwestern Bell Tel. Co. v. Hamil, 116 S.W.3d 798 (Tex. App. Fort Worth 2003).
- A proper award of damages for common law trespass is the reasonable rental value of the property. *Thomas v. Harrah's Vicksburg Corp.*, 734 So. 2d 312 (Miss. Ct. App. 1999).
- A landowner suing for trespass may only recover damages for loss of use if the reasonable value of the use can be established with fair certainty; absolute certainty is not required because latitude is allowed in determining damages where there is no precise measurement. *Southwestern Bell Tel. Co. v. Hamil*, 116 S.W.3d 798 (Tex. App. Fort Worth 2003).
- 4 McDermott v. City of Albany, 309 A.D.2d 1004, 765 N.Y.S.2d 903 (3d Dep't 2003).
- 5 Morales v. Riley, 28 A.D.3d 623, 813 N.Y.S.2d 518 (2d Dep't 2006).
- 6 Hammond v. County of Madera, 859 F.2d 797 (9th Cir. 1988).
- 7 Pearl v. Pic Walsh Freight Co., 112 Ohio App. 11, 15 Ohio Op. 2d 338, 168 N.E.2d 571 (1st Dist. Hamilton County 1960).

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## 75 Am. Jur. 2d Trespass § 109

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

##### 2. Measure of Damages

##### b. Damage to Real Property

##### (2) Diminution in Value

### § 109. Factors in determining diminished value of land after trespass—Destruction of trees or shrubbery

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  52

#### A.L.R. Library

[Measure of damages for destruction of or injury to fruit, nut, or other productive trees, 90 A.L.R.3d 800](#)

#### Forms

[Am. Jur. Pleading and Practice Forms, Trespass § 53](#) (Instruction to jury—Damages recoverable for trespass by cutting timber)

For damages arising out of trespass to property involving destruction of trees, an owner may recover "diminution damages," that is, the loss of value of the real property<sup>1</sup> or the value of the trees at the time and place of their being felled plus incidental damage.<sup>2</sup>

Factors the jury may properly be instructed to consider in determining the diminished value of the plaintiffs' property as a result of the defendant's trespass and the cutting of trees of various kinds and sizes include the purpose for which the particular trees were grown and maintained, the cost of replacement or restoration to the same extent that is reasonable and practicable, and the contemplated use of the particular lands from which the trees were cut or removed, including any aesthetic value to the landowners of such trees.<sup>3</sup>

Where trees have been cut and removed through inadvertence or mistake, the proper measure of damages for trespass is the "stumpage value," the value of the standing trees, unenhanced by any labor of the trespasser; but when a trespass is willful, the value of the timber as enhanced by the trespasser's labor in cutting, loading, and hauling the timber, which is commonly known as the timber's "delivered value," is the appropriate measure of damages.<sup>4</sup>

Under some circumstances, the general rule for assessing damages does not wholly compensate the owner and a judicially recognized exception has been established which, under certain conditions, will permit the recovery of damages for the loss of the intrinsic value of the trees.<sup>5</sup> While diminution in the market value of the plaintiff's real property is the ordinary measure of damages in a timber trespass case involving ornamental trees,<sup>6</sup> the proper measure of damages for the wrongful destruction of ornamental or shade trees, which did not decrease the market value of the land, is the intrinsic or special value of the trees removed.<sup>7</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Homeowners' general interest in privacy and vague assertions of the aesthetic worth of bamboo, as opposed to any other natural barrier, did not establish value personal to homeowners for purposes of determining damages recoverable in action for trespass to land brought by homeowners against neighbors, who removed bamboo fence, which separated their properties and which allegedly provided homeowners complete visual privacy from neighbors. [Kornbleuth v. Westover](#), 241 N.J. 289, 227 A.3d 1209 (2020).

## [END OF SUPPLEMENT]

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### Footnotes

<sup>1</sup> [Persky v. Vaughn](#), 741 So. 2d 414 (Ala. Civ. App. 1998); [Hardie v. Mistriel](#), 133 Conn. App. 572, 36 A.3d 261 (2012); [Klingshirn v. McNeal](#), 239 Ga. App. 112, 520 S.E.2d 761 (1999); [Barnard v. Rowland](#), 132 N.C. App. 416, 512 S.E.2d 458 (1999); [Blust v. Lamar Advertising Co.](#), 157 Ohio App. 3d 787, 2004-Ohio-2433, 813 N.E.2d 902 (2d Dist. Montgomery County 2004); [Allyn v. Boe](#), 87 Wash. App. 722, 943 P.2d 364 (Div. 2 1997).

<sup>2</sup> [Hardie v. Mistriel](#), 133 Conn. App. 572, 36 A.3d 261 (2012); [Klingshirn v. McNeal](#), 239 Ga. App. 112, 520 S.E.2d 761 (1999); [Barnard v. Rowland](#), 132 N.C. App. 416, 512 S.E.2d 458 (1999).

For commercial trees whose primary value derives from their use as a commodity, the assessment of damages is relatively straightforward; damages may be assessed using the fair market value of timber, lumber, or other wood products. [Morabit v. Hoag](#), 80 A.3d 1 (R.I. 2013).

- 3 Harper v. Morris, 89 N.C. App. 145, 365 S.E.2d 176 (1988).  
4 Smiley v. Yllander, 105 So. 3d 1171 (Miss. Ct. App. 2012).  
5 Miloszar v. Gonzalez, 619 S.W.2d 283 (Tex. Civ. App. Corpus Christi 1981).  
6 Cohen v. Awbrey Glen Homeowners Association, Inc., 283 Or. App. 244, 388 P.3d 1160 (2016).  
7 Hardie v. Mistriel, 133 Conn. App. 572, 36 A.3d 261 (2012); Shearer's Inc. v. Lyall, 717 S.W.2d 128 (Tex. App. Houston 14th Dist. 1986).

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## 75 Am. Jur. 2d Trespass § 110

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### Trespass

Eric C. Surette, J.D.

#### V. Remedies; Damages

##### B. Damages

##### 2. Measure of Damages

##### b. Damage to Real Property

##### (3) Cost of Restoration or Repair

### § 110. Cost of restoration or repair as measure of damages for trespass, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  50, 51

The cost of restoring the property to its condition prior to the injury caused by a trespass is an alternative to the measure of diminution of market value<sup>1</sup> where the injury to the land resulting from a trespass is temporary and subject to restoration,<sup>2</sup> unless such cost is disproportionate to<sup>3</sup> or greater than the diminution in value of the property.<sup>4</sup> Damages for restoration or replacement are limited to situations where replacement or restoration costs are feasible and reasonable.<sup>5</sup> Property owners may be entitled to recover the cost to restore the property, as the measure of damages for a person's trespass by building a road across the property, despite the contention that the road increases the value of the owners' property.<sup>6</sup>

Restoration damages awarded when trespass of land results in the destruction of property are appropriately awarded for the destruction of a specific item when the thing which is destroyed or injured, although a part of or attached to the realty, has a distinct value without reference to the realty on which it stands or from which it grows.<sup>7</sup>

Property owners are not liable for the entire cost of remediation damages as a result of their wrongful trespass when they own a portion of the property requiring remediation.<sup>8</sup>

Where the trespass is occasioned by the termination of a landowner's consent to the presence of a structure, chattel, or other thing which was originally placed on the land with the consent of the landowner, damages recoverable for such a trespass may include the reasonable cost of removing the structure or chattel.<sup>9</sup>

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Footnotes

- 1 [Armitage v. Decker](#), 218 Cal. App. 3d 887, 267 Cal. Rptr. 399 (1st Dist. 1990); [Lamb v. Euclid Ambler Associates](#), 563 A.2d 365 (Me. 1989); [Kirkbride v. Lisbon Contractors, Inc.](#), 385 Pa. Super. 292, 560 A.2d 809 (1989).  
If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include the cost of restoration that has been or may be reasonably incurred. [Restatement Second, Torts § 929\(1\)\(a\)](#).
- 2 [R & S Development, Inc. v. Wilson](#), 534 So. 2d 1008 (Miss. 1988); [Denke v. Mamola](#), 437 N.W.2d 205 (S.D. 1989).
- 3 [First Baptist Church of Lombard v. Toll Highway Authority](#), 301 Ill. App. 3d 533, 234 Ill. Dec. 878, 703 N.E.2d 978 (2d Dist. 1998).  
If the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, unless there is a reason personal to the owner for restoring the original condition, damages are measured only by the difference between the value of the land before and after the harm. [Restatement Second, Torts § 929](#), comment b.
- 4 [Denke v. Mamola](#), 437 N.W.2d 205 (S.D. 1989).  
A landowner may recover restoration costs for trespass of land resulting in destruction of property only if the cost of restoration is less than the diminution in value of the entire property. [Patterson v. Holleman](#), 917 So. 2d 125 (Miss. Ct. App. 2005).
- 5 [Lamb v. Euclid Ambler Associates](#), 563 A.2d 365 (Me. 1989).
- 6 [Locklear v. Sellers](#), 126 So. 3d 978 (Miss. Ct. App. 2013).
- 7 [Patterson v. Holleman](#), 917 So. 2d 125 (Miss. Ct. App. 2005).
- 8 [Gibbs v. Porath](#), 121 A.D.3d 1210, 995 N.Y.S.2d 237 (3d Dep't 2014).
- 9 [Anchorage Yacht Haven, Inc. v. Robertson](#), 264 So. 2d 57 (Fla. 4th DCA 1972).

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## 75 Am. Jur. 2d Trespass § 111

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### Trespass

Eric C. Surette, J.D.

#### V. Remedies; Damages

##### B. Damages

##### 2. Measure of Damages


##### b. Damage to Real Property

##### (3) Cost of Restoration or Repair

### § 111. Uniqueness of land as effecting restoration or repair damages for trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  50, 51

Inquiries as to the value or the costs for necessary repairs to real property are usually confined to the time of the trespass and the locality where it occurred.<sup>1</sup>

While an award of the costs of restoration of property to its original condition may be an appropriate consideration in trespass cases where the property destroyed had a unique value of its own, it is not proper where there is no evidence that the affected property had any special value to the plaintiff.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Moore v. Rotello](#), 719 S.W.2d 372 (Tex. App. Houston 14th Dist. 1986), writ refused n.r.e., (Jan. 21, 1987).

<sup>2</sup> [Miloszar v. Gonzalez](#), 619 S.W.2d 283 (Tex. Civ. App. Corpus Christi 1981).

A landowner established reasons personal to restore the property to its former condition, thus supporting an award of restoration damages to the landowner in the landowner's action against a neighbor to recover for burned vegetation caused by a wildfire resulting from the neighbor's negligent dumping of ashes, as the landowner testified that his property had noncommercial value to him and that he did not intend ever to sell the property, the landowner testified that he had specifically selected the piece of property because of the

vegetation on the property and because of his history hunting the land, and the landowner testified that he intended to retire on the property. [Lampi v. Speed, 2011 MT 231, 362 Mont. 122, 261 P.3d 1000 \(2011\)](#).

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## 75 Am. Jur. 2d Trespass § 112

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

##### 2. Measure of Damages

##### c. Damage to, Loss of Use of, or Destruction of Chattel

### § 112. Damages to chattels caused by trespass, generally; diminution in value

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  49

#### Forms

[Am. Jur. Pleading and Practice Forms, Trespass §§ 88 to 92](#) (Complaint, petition, or declaration—Trespass to personal property)

Plaintiffs are entitled to recover for the loss of personal property if the loss is proximately caused by a trespass<sup>1</sup> and a plaintiff may recover the actual damages suffered by reason of the impairment of the property or the loss of its use.<sup>2</sup> The measure for damage to chattel or personal property from trespass is the same as for a trespass to real property, that is, the difference between the fair market value of the property before the injury and the fair market value of the property after the injury.<sup>3</sup> The cost of necessary repair is an evidentiary factor which a jury may consider in determining the proper measure of damages for the trespass.<sup>4</sup>

A person seeking recovery for trespass to a chattel based on damage to the particular chattel may seek money damages.<sup>5</sup>

**Comment:**

The owner of a chattel can recover only the difference in its value before and after the harm, except that if, after the harm, it appears to be economical to repair the chattel, the owner can elect to recover the cost of repairs, together with the value of the loss of use during the repairs or other losses that may have resulted during that time; if, however, the chattel has peculiar value to the owner, as when a family portrait having substantially no exchange value has been harmed or when there would be serious delay or inconvenience in obtaining another chattel, it may be reasonable to make repairs at an expense greater than the cost of another chattel.<sup>6</sup>

An award of nominal damages in the absence of proof of actual damages may be made in an action for trespass to chattels when there has been a dispossession of the other of the chattel.<sup>7</sup>

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**Footnotes**

- 1 [Borland v. Sanders Lead Co., Inc.](#), 369 So. 2d 523, 2 A.L.R.4th 1042 (Ala. 1979).
- 2 [Intel Corp. v. Hamidi](#), 30 Cal. 4th 1342, 1 Cal. Rptr. 3d 32, 71 P.3d 296 (2003).
- 3 [Garner v. Kent Excavation, Inc.](#), 532 So. 2d 1033 (Ala. Civ. App. 1988).  
As to a lessee of real property, the proper measure of damages for trespass for the wrongful taking of chattels from the possession of another is the value of the goods at the time and place of the wrongful taking and removal. [Coddington v. Staab](#), 716 So. 2d 850 (Fla. 4th DCA 1998).  
As to damages to real property, generally, see §§ 103 to 111.
- 4 [Garner v. Kent Excavation, Inc.](#), 532 So. 2d 1033 (Ala. Civ. App. 1988).
- 5 [Tennant v. Chase Home Finance, LLC](#), 187 So. 3d 1172 (Ala. Civ. App. 2015).
- 6 [Restatement Second, Torts § 928](#), comment a.
- 7 [Mercer v. Halmbacher](#), 2015-Ohio-4167, 44 N.E.3d 1011 (Ohio Ct. App. 9th Dist. Summit County 2015).  
As to nominal damages, generally, see § 115.

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## 75 Am. Jur. 2d Trespass § 113

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

##### 2. Measure of Damages

##### c. Damage to, Loss of Use of, or Destruction of Chattel

### § 113. Loss of use of chattels caused by trespass; loss of time

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  49

In addition to damages for the diminution of the value of the subject matter or other similar elements of damages, the plaintiff is entitled to recover for any loss of which the defendant's act is the legal cause, either because the plaintiff is unable to use the subject matter until it is repaired or replaced or otherwise.<sup>1</sup> Further, this is true even where the owner suffers no harm through the deprivation of the chattel, as when the owner was not using it or where the owner had a substitute that was used without any expense to him or her.<sup>2</sup> However, it has been held that the loss of time occasioned to the owner of a chattel by reason of its destruction cannot be considered in estimating the damage resulting from the loss of the property, except in unusual circumstances, as where the plaintiff is unable to perform his or her work or a contract without the use of the property.<sup>3</sup>

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#### Footnotes

- <sup>1</sup> [Restatement Second, Torts § 928](#), comment b.
- <sup>2</sup> [Restatement Second, Torts § 931](#), comment b.
- <sup>3</sup> [Ford Motor Co. v. Bradley Transp. Co.](#), 174 F.2d 192 (6th Cir. 1949).

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## 75 Am. Jur. 2d Trespass § 114

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### Trespass

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#### V. Remedies; Damages

#### B. Damages

#### 3. Particular Types or Elements of Damages for Trespass

##### a. Actual and Nominal Damages

## § 114. Actual damages for trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  47 to 50

A person damaged by trespass is entitled to full indemnification.<sup>1</sup>

A plaintiff who proves that a defendant's conduct amounted to a trespass is entitled to recover the amount of actual damages suffered, if any,<sup>2</sup> however, actual damages must be shown.<sup>3</sup>

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#### Footnotes

- <sup>1</sup> [Powell v. Dorris](#), 814 So. 2d 763 (La. Ct. App. 2d Cir. 2002).
- <sup>2</sup> [Crown Property Dev., Inc. v. Omega Oil Co.](#), 113 Ohio App. 3d 647, 681 N.E.2d 1343 (12th Dist. Fayette County 1996).
- <sup>3</sup> [Whitten v. Cox](#), 799 So. 2d 1 (Miss. 2000); [Misseldine v. Corporate Investigative Services, Inc.](#), 2003-Ohio-2740, 2003 WL 21234928 (Ohio Ct. App. 8th Dist. Cuyahoga County 2003).  
An adjoining landowners' act of trespass in erecting a chain-link fence that denied a landowner access to a portion of her backyard supported an award of actual, rather than nominal damages. [Kitterman v. Simrall](#), 924 S.W.2d 872 (Mo. Ct. App. W.D. 1996).

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## 75 Am. Jur. 2d Trespass § 115

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### Trespass

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#### V. Remedies; Damages

#### B. Damages


#### 3. Particular Types or Elements of Damages for Trespass

##### a. Actual and Nominal Damages

### § 115. Nominal damages for trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  47 to 50

In the absence of proven or actual damages, plaintiffs are entitled to nominal damages in an action for trespass.<sup>1</sup> Nominal damages are always appropriate for a trespass, but, if proved, compensatory damages may also be awarded.<sup>2</sup> The limited right to recover nominal damages in an action for trespass to real property is appropriate when needed to protect an important right, even absent any substantial loss or injury.<sup>3</sup>

#### Distinction:

Nominal damages are to be distinguished from compensatory damages on the one hand and from punitive damages on the other, in that they are granted irrespective of harm to the complainant or of a bad state of mind on the part of the defendant.<sup>4</sup> They are given neither to compensate the plaintiff nor to punish the defendant.<sup>5</sup>

Footnotes

- 1 [Webb v. Knology, Inc.](#), 164 So. 3d 613 (Ala. Civ. App. 2014); [Lee v. Konrad](#), 337 P.3d 510 (Alaska 2014); [Daniel v. Morris](#), 181 So. 3d 1195 (Fla. 5th DCA 2015); [Coastal Oil & Gas Corp. v. Garza Energy Trust](#), 268 S.W.3d 1 (Tex. 2008).
- Particularly in matters involving rights relating to real property, an invasion of those rights, when established, requires some recognition, even if only by way of nominal damages; suits involving such rights cannot fail as de minimus, since the invasion of those rights, if repeated, may operate in derogation of them. [Evans v. Cote](#), 197 Vt. 523, 2014 VT 104, 107 A.3d 911 (2014).
- Nominal damages are a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he or she is entitled to compensatory damages. [Restatement Second, Torts § 907](#).
- As to the effect of a finding of trespass without an award of damages, see [§ 97](#).
- 2 [Grygiel v. Monches Fish & Game Club, Inc.](#), 2010 WI 93, 328 Wis. 2d 436, 787 N.W.2d 6 (2010).
- 3 [Miller v. Distribution Systems of America, Inc.](#), 175 Misc. 2d 513, 670 N.Y.S.2d 668 (App. Term 1997).
- 4 [Restatement Second, Torts § 907](#), comment a.
- 5 [Restatement Second, Torts § 907](#), comment a.

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## 75 Am. Jur. 2d Trespass § 116

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

#### 3. Particular Types or Elements of Damages for Trespass

##### b. Consequential Damages

### § 116. Consequential damages for trespass, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  48

A trespasser is responsible in damages for all injurious consequences flowing from a trespass which are the natural and proximate result of his or her conduct,<sup>1</sup> including all direct consequences of any conduct engaged in while trespassing, as well as the indirect consequences, some of which may not have been reasonably foreseeable.<sup>2</sup> However, alleged damages suffered by a party alleging trespass are not recoverable if they do not flow as a natural consequence of the alleged trespass.<sup>3</sup>

#### Observation:

A trespass on land subjects the trespasser to liability for physical harm to the possessor of the land at the time of the trespass, to the land or to the possessor's things, or to members of his or her household or to their things, caused by any act done, activity carried on, or condition created by the trespasser, irrespective of whether the trespasser's conduct is such as would subject him or her to liability were he or she not a trespasser.<sup>4</sup>

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Footnotes

- 1 [Hughett v. Caldwell County](#), 313 Ky. 85, 230 S.W.2d 92, 21 A.L.R.2d 373 (1950) (abrogated on other grounds by, [Harrod Concrete and Stone Co. v. Crutcher](#), 458 S.W.3d 290 (Ky. 2015)); [Curtis v. Fruin-Colnon Contracting Co.](#), 363 Mo. 676, 253 S.W.2d 158 (1952); [Dellaportas v. County of Putnam](#), 240 A.D.2d 358, 658 N.Y.S.2d 116 (2d Dep't 1997).
- 2 [Miller v. National Broadcasting Co.](#), 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668, 69 A.L.R.4th 1027 (2d Dist. 1986).
- 3 [OSJ, Inc. v. Work](#), 180 Misc. 2d 804, 691 N.Y.S.2d 302 (Sup 1999), [aff'd](#), 273 A.D.2d 721, 710 N.Y.S.2d 666 (3d Dep't 2000).
- 4 [Restatement Second, Torts § 162](#).

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## 75 Am. Jur. 2d Trespass § 117

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

##### 3. Particular Types or Elements of Damages for Trespass

##### b. Consequential Damages

## § 117. Injuries to persons resulting from trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  48

A trespasser is generally considered liable for all personal injuries to a landowner resulting directly or naturally from his or her trespass.<sup>1</sup> If injury or damage to a property owner or to a member of his or her household results primarily and directly from the act of a trespass, the trespasser is liable therefor even though his or her act is not negligent or willful.<sup>2</sup>

However, a trespass to land does not make the trespasser an insurer of the landowner or members of his or her household for injuries or damages which may be a secondary, indirect, or consequential result of the trespass.<sup>3</sup> If the owner or possessor of the land him- or herself, willfully, voluntarily, or by negligence, brings about the injury to his or her person, such an injury cannot be said to be consequent upon the trespass to the land, and in that event, the trespasser would not be liable therefor.<sup>4</sup>

One who is wronged by a trespass may recover general damages suffered, including physical pain.<sup>5</sup>

Ill health and physical disability suffered by the plaintiff may also be the natural and probable consequences of a trespass by the defendant as to subject him or her to liability therefor.<sup>6</sup>

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### Footnotes

- 1 Miller v. National Broadcasting Co., 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668, 69 A.L.R.4th 1027 (2d Dist.  
1986); Kopka v. Bell Telephone Co. of Pa., 371 Pa. 444, 91 A.2d 232 (1952).  
2 Connolley v. Omaha Public Power Dist., 185 Neb. 501, 177 N.W.2d 492 (1970).  
3 Connolley v. Omaha Public Power Dist., 185 Neb. 501, 177 N.W.2d 492 (1970).  
4 Kopka v. Bell Telephone Co. of Pa., 371 Pa. 444, 91 A.2d 232 (1952).  
5 Bayou Fleet Partnership v. Clulee, 150 So. 3d 329 (La. Ct. App. 5th Cir. 2014).  
6 Hammond v. County of Madera, 859 F.2d 797 (9th Cir. 1988).

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## 75 Am. Jur. 2d Trespass § 118

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#### V. Remedies; Damages

##### B. Damages

#### 3. Particular Types or Elements of Damages for Trespass

##### b. Consequential Damages

## § 118. Injuries to persons resulting from trespass—Mental and emotional injury

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  48

If a trespass causes mental distress, the trespasser is liable in damages for the mental distress and for any resulting harm.<sup>1</sup> Anguish,<sup>2</sup> humiliation, embarrassment,<sup>3</sup> distress,<sup>4</sup> discomfort, and annoyance are appropriate considerations in an award of damages for injuries resulting from a trespass.<sup>5</sup> For instance, damages from mental suffering are recoverable if the trespass was committed under circumstances of insult, rude language or treatment, haughtiness, and contempt.<sup>6</sup> However, minimal and normal worry and inconvenience are not compensable.<sup>7</sup>

### Observation:

Under the law of some jurisdictions, the consequences flowing from an intentional tort such as a trespass may include emotional distress even without a physical injury to the person or to the land.<sup>8</sup>

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Footnotes

- 1 [Hammond v. County of Madera](#), 859 F.2d 797 (9th Cir. 1988).
- 2 [Armitage v. Decker](#), 218 Cal. App. 3d 887, 267 Cal. Rptr. 399 (1st Dist. 1990); [Bayou Fleet Partnership v. Clulee](#), 150 So. 3d 329 (La. Ct. App. 5th Cir. 2014).
- 3 [Owens v. Smith](#), 541 So. 2d 950 (La. Ct. App. 2d Cir. 1989).
- 4 [Armitage v. Decker](#), 218 Cal. App. 3d 887, 267 Cal. Rptr. 399 (1st Dist. 1990); [Bayou Fleet Partnership v. Clulee](#), 150 So. 3d 329 (La. Ct. App. 5th Cir. 2014).
- 5 [Hendleman v. Los Altos Apartments, L.P.](#), 160 Cal. Rptr. 3d 730 (Cal. App. 2d Dist. 2013); [Statler v. Catalano](#), 167 Ill. App. 3d 397, 118 Ill. Dec. 283, 521 N.E.2d 565 (5th Dist. 1988).  
If a person is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for discomfort and annoyance to the person as an occupant. [Restatement Second, Torts § 929\(1\)\(c\)](#).
- 6 [Ex parte SouthTrust Bank of Alabama, N.A.](#), 523 So. 2d 407 (Ala. 1988).
- 7 [Bayou Fleet Partnership v. Clulee](#), 150 So. 3d 329 (La. Ct. App. 5th Cir. 2014).
- 8 [Miller v. National Broadcasting Co.](#), 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668, 69 A.L.R.4th 1027 (2d Dist. 1986).

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## 75 Am. Jur. 2d Trespass § 119

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### Trespass

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#### V. Remedies; Damages

#### B. Damages

#### 3. Particular Types or Elements of Damages for Trespass

#### b. Consequential Damages

### § 119. Interest on damages in trespass action

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  47

#### A.L.R. Library

[Interest on damages for period before judgment for injury to, or detention, loss, or destruction of, property, 36 A.L.R.2d 337](#)

In trespass actions involving the destruction of or injury to property, interest is allowed<sup>1</sup> from the time of the trespass.<sup>2</sup> Although some jurisdictions hold that interest may be recovered as a matter of right,<sup>3</sup> in others, the allowance of interest is held to rest in the discretion of the jury and not to be a matter of legal right.<sup>4</sup>

Prejudgment interest may be awarded on the compensatory portion of a treble damages award for a trespass but not on the punitive portion of the award.<sup>5</sup>

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#### Footnotes

<sup>1</sup> [Matanuska Elec. Ass'n, Inc. v. Weissler, 723 P.2d 600 \(Alaska 1986\).](#)

- 2                    [Bayer v. Airlift Intern., Inc.](#), 111 N.J. Super. 461, 268 A.2d 548 (Ch. Div. 1970); [Torrans v. Tri-State Iron](#)  
                      [& Metal Co.](#), 381 S.W.2d 668 (Tex. Civ. App. Texarkana 1964).
- 3                    [Flamm v. Noble](#), 296 N.Y. 262, 72 N.E.2d 886, 171 A.L.R. 812 (1947).
- 4                    [Mullins v. Clinchfield Coal Corp.](#), 227 F.2d 881 (4th Cir. 1955).
- 5                    [Matanuska Elec. Ass'n, Inc. v. Weissler](#), 723 P.2d 600 (Alaska 1986).
- As to the statutory provision for multiple damages, generally, see §§ [126](#) to [129](#).
- As to punitive damages, generally, see §§ [121](#) to [125](#).

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## 75 Am. Jur. 2d Trespass § 120

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

#### 3. Particular Types or Elements of Damages for Trespass

##### b. Consequential Damages

### § 120. Interest on damages in trespass action—Incidental expenses; litigation fees and costs

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  47

Generally, apart from the sums allowable and taxed as costs, there can be no recovery as damages of the costs and expenses of litigation or expenditures for counsel fees for a trespass to land,<sup>1</sup> although limited attorney's fees may be available in a statutory trespass action.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Patterson v. Holleman](#), 917 So. 2d 125 (Miss. Ct. App. 2005).

<sup>2</sup> [Dupuis v. Soucy](#), 2011 ME 2, 11 A.3d 318 (Me. 2011).

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## 75 Am. Jur. 2d Trespass § 121

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#### V. Remedies; Damages

#### B. Damages

#### 3. Particular Types or Elements of Damages for Trespass

#### c. Punitive or Exemplary Damages

### § 121. Punitive or exemplary damages in trespass action, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  56

In a case of trespass, there is no right to an award of punitive damages;<sup>1</sup> they are not recoverable as a matter of law.<sup>2</sup> However, the common law permits an award of punitive damages in an action for trespass.<sup>3</sup> More specifically, it is a well-established principle of the common law that in actions of trespass, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of the defendant's offense rather than the measure of compensation to the plaintiff.<sup>4</sup>

#### Observation:

Punitive, or exemplary, damages are damages other than compensatory or nominal damages, intended to punish the trespasser for outrageous conduct and to deter the trespasser and others from similar conduct in the future.<sup>5</sup>

Attorney's fees may be included as part of an award of punitive damages.<sup>6</sup>

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Footnotes

- 1 Jochem v. Kerstiens, 498 N.E.2d 1241 (Ind. Ct. App. 1986); Belluomo v. KAKE TV & Radio, Inc., 3 Kan. App. 2d 461, 596 P.2d 832 (1979).
- 2 Ex parte Broadway, 351 So. 2d 1378 (Ala. 1977).
- 3 Fleming v. EQT Gathering, LLC, 509 S.W.3d 18 (Ky. 2017); Bare v. Carroll Electric Cooperative Corporation, 2018 WL 1281114 (Mo. Ct. App. S.D. 2018), reh'g and/or transfer denied, (Apr. 4, 2018) and transfer denied, (July 3, 2018).  
It is undisputed that punitive damages may be awarded for actions based on real property trespass. West v. Hogan, 88 A.D.3d 1247, 930 N.Y.S.2d 708 (4th Dep't 2011), aff'd, 19 N.Y.3d 1073, 955 N.Y.S.2d 543, 979 N.E.2d 802 (2012).
- 4 Molzof v. U.S., 502 U.S. 301, 112 S. Ct. 711, 116 L. Ed. 2d 731 (1992).
- 5 Statler v. Catalano, 167 Ill. App. 3d 397, 118 Ill. Dec. 283, 521 N.E.2d 565 (5th Dist. 1988); Jochem v. Kerstiens, 498 N.E.2d 1241 (Ind. Ct. App. 1986); Meighan v. U.S. Sprint Communications Co., 924 S.W.2d 632 (Tenn. 1996).
- 6 Estate of Jones By and Through Jones v. Pruitt, 243 So. 3d 212 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 70 (Miss. 2018).

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## 75 Am. Jur. 2d Trespass § 122

American Jurisprudence, Second Edition | May 2021 Update

### Trespass

Eric C. Surette, J.D.

#### V. Remedies; Damages

#### B. Damages

#### 3. Particular Types or Elements of Damages for Trespass

#### c. Punitive or Exemplary Damages

### § 122. Actual damages as prerequisite to punitive damages for trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  56

#### A.L.R. Library

[Sufficiency of showing of actual damages to support award of punitive damages—modern cases, 40 A.L.R.4th 11](#)

In general, actual, or compensatory, damages are a prerequisite to an award of punitive damages in an action for trespass.<sup>1</sup> Even where actual harm is slight, an award of punitive damages may be appropriate for a trespass.<sup>2</sup>

However, actual damages, required for punitive damages to be recoverable, are presumed in an action for intentional trespass to land, and thus awarding punitive damages is not an error even in the absence of actual damages.<sup>3</sup> Nominal damages can support a punitive damage award in the case of intentional trespass to land because both the individual and society have significant interests in deterring intentional trespass to land, regardless of the lack of resulting measurable harm.<sup>4</sup>

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#### Footnotes

- 1                    [Koepnick v. Sears Roebuck & Co.](#), 158 Ariz. 322, 762 P.2d 609 (Ct. App. Div. 1 1988); [Jochem v. Kerstiens](#),  
498 N.E.2d 1241 (Ind. Ct. App. 1986); [Lake Mille Lacs Inv., Inc. v. Payne](#), 401 N.W.2d 387 (Minn. Ct. App.  
1987); [Ball v. Overton Square, Inc.](#), 731 S.W.2d 536 (Tenn. Ct. App. 1987).  
A trial court's award of punitive damages in a landowner's trespass action against a grandson following a  
bench trial, without an award of compensatory damages, was improper as a matter of law, even though the  
landowner was awarded injunctive relief. [Martin v. Martin](#), 267 Ga. App. 596, 600 S.E.2d 682 (2004).
- 2                    [Munger v. Seehafer](#), 2016 WI App 89, 372 Wis. 2d 749, 890 N.W.2d 22 (Ct. App. 2016).
- 3                    [Conner v. Lucas By and Through Lucas](#), 141 Or. App. 531, 920 P.2d 171 (1996).
- 4                    [Jacque v. Steenberg Homes, Inc.](#), 209 Wis. 2d 605, 563 N.W.2d 154 (1997).

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## 75 Am. Jur. 2d Trespass § 123

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### Trespass

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### § 123. Elements of conduct warranting punitive damages for trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  56

Punitive damages may be awarded as punishment for a trespass which was deliberate,<sup>1</sup> willful,<sup>2</sup> rude,<sup>3</sup> reckless,<sup>4</sup> grossly negligent,<sup>5</sup> wanton,<sup>6</sup> malicious,<sup>7</sup> or in conscious disregard of the plaintiff's property rights,<sup>8</sup> or fraudulent,<sup>9</sup> or that was accompanied with deliberate violence,<sup>10</sup> oppression,<sup>11</sup> or other aggravating circumstances.<sup>12</sup>

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#### Footnotes

- 1 [Skelton v. Haney](#), 116 Idaho 511, 777 P.2d 733 (1989).  
For exemplary damages to be recoverable for the tort of trespass, the trespass must be initiated by or accompanied with some evil intent or with complete disregard of anyone's rights. [Wilen v. Falkenstein](#), 191 S.W.3d 791 (Tex. App. Fort Worth 2006).
- 2 [Estate of Jones By and Through Jones v. Pruitt](#), 243 So. 3d 212 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 70 (Miss. 2018); [Ogg v. Mediacom, L.L.C.](#), 142 S.W.3d 801 (Mo. Ct. App. W.D. 2004); [Levitt v. Vining](#), 161 A.D.3d 1289, 75 N.Y.S.3d 665 (3d Dep't 2018); [Wimberly v. Barr](#), 359 S.C. 414, 597 S.E.2d 853 (Ct. App. 2004).
- 3 [Webb v. Knology, Inc.](#), 164 So. 3d 613 (Ala. Civ. App. 2014).
- 4 [Webb v. Knology, Inc.](#), 164 So. 3d 613 (Ala. Civ. App. 2014); [Warm v. State](#), 308 A.D.2d 534, 764 N.Y.S.2d 483 (2d Dep't 2003); [Wimberly v. Barr](#), 359 S.C. 414, 597 S.E.2d 853 (Ct. App. 2004).
- 5 [Webb v. Knology, Inc.](#), 164 So. 3d 613 (Ala. Civ. App. 2014); [Estate of Jones By and Through Jones v. Pruitt](#), 243 So. 3d 212 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 70 (Miss. 2018).



- 6 Webb v. Knology, Inc., 164 So. 3d 613 (Ala. Civ. App. 2014); Akers v. D.L. White Const., Inc., 156 Idaho 37, 320 P.3d 428 (2014); Estate of Jones By and Through Jones v. Pruitt, 243 So. 3d 212 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 70 (Miss. 2018); Levitt v. Vining, 161 A.D.3d 1289, 75 N.Y.S.3d 665 (3d Dep't 2018).  
"Wantonness" in a trespass action is established by the mere knowledge on the part of the defendant of his or her invasion of the plaintiff's rights. Webb v. Knology, Inc., 164 So. 3d 613 (Ala. Civ. App. 2014).
- 7 Webb v. Knology, Inc., 164 So. 3d 613 (Ala. Civ. App. 2014); Locklear v. Sellers, 126 So. 3d 978 (Miss. Ct. App. 2013); Ogg v. Mediacom, L.L.C., 142 S.W.3d 801 (Mo. Ct. App. W.D. 2004); Levitt v. Vining, 161 A.D.3d 1289, 75 N.Y.S.3d 665 (3d Dep't 2018) (actual malice); Wilen v. Falkenstein, 191 S.W.3d 791 (Tex. App. Fort Worth 2006).  
The "malice" element required in order to recover punitive damages for trespass on real property is not equivalent of the "hostility" requirement of an adverse possession claim. Litwin v. Town of Huntington, 248 A.D.2d 361, 669 N.Y.S.2d 634 (2d Dep't 1998).
- 8 Akers v. D.L. White Const., Inc., 156 Idaho 37, 320 P.3d 428 (2014); Levitt v. Vining, 161 A.D.3d 1289, 75 N.Y.S.3d 665 (3d Dep't 2018).
- 9 Webb v. Knology, Inc., 164 So. 3d 613 (Ala. Civ. App. 2014); Armitage v. Decker, 218 Cal. App. 3d 887, 267 Cal. Rptr. 399 (1st Dist. 1990); Akers v. D.L. White Const., Inc., 156 Idaho 37, 320 P.3d 428 (2014); Jochem v. Kerstiens, 498 N.E.2d 1241 (Ind. Ct. App. 1986).
- 10 Statler v. Catalano, 167 Ill. App. 3d 397, 118 Ill. Dec. 283, 521 N.E.2d 565 (5th Dist. 1988).
- 11 Webb v. Knology, Inc., 164 So. 3d 613 (Ala. Civ. App. 2014); Armitage v. Decker, 218 Cal. App. 3d 887, 267 Cal. Rptr. 399 (1st Dist. 1990); Meighan v. U.S. Sprint Communications Co., 924 S.W.2d 632 (Tenn. 1996).
- 12 Ex parte SouthTrust Bank of Alabama, N.A., 523 So. 2d 407 (Ala. 1988); Meighan v. U.S. Sprint Communications Co., 924 S.W.2d 632 (Tenn. 1996).

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## 75 Am. Jur. 2d Trespass § 124

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### Trespass

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#### V. Remedies; Damages

##### B. Damages

##### 3. Particular Types or Elements of Damages for Trespass

##### c. Punitive or Exemplary Damages

### § 124. Elements of conduct warranting punitive damages for trespass—Conduct attributable to human failing distinguished

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  56

#### A.L.R. Library

[Punitive damages for wrongful seizure of chattel by one claiming security interest, 35 A.L.R.3d 1016](#)

The conduct sufficient to warrant an award of punitive damages must be inconsistent with a hypothesis of mere negligence, mistake of law or fact, overzealousness, or other human failing.<sup>1</sup> Exemplary or punitive damages may not be recovered where it appears that the defendant acted in a good- faith belief that he or she was exercising his or her right<sup>2</sup> or under a mistake, without willful and wanton misconduct,<sup>3</sup> malice,<sup>4</sup> or wrongful intent.<sup>5</sup>

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#### Footnotes

<sup>1</sup> [Jochem v. Kerstiens](#), 498 N.E.2d 1241 (Ind. Ct. App. 1986).

<sup>2</sup> [Wilén v. Falkenstein](#), 191 S.W.3d 791 (Tex. App. Fort Worth 2006).

A lender was not liable to a trust for punitive damages for its actions relating to trust property where the lender acted in accordance with rights it believed it possessed as a result of a quitclaim deed to it by the trustee. [Walter E. Wilhite Revocable Living Trust v. Northwest Yearly Meeting Pension Fund](#), 128 Idaho 539, 916 P.2d 1264 (1996).

3 [Horn v. Corkland Corp.](#), 518 So. 2d 418 (Fla. 2d DCA 1988).

4 [La Bruno v. Lawrence](#), 64 N.J. Super. 570, 166 A.2d 822 (App. Div. 1960).

5 [Wilen v. Falkenstein](#), 191 S.W.3d 791 (Tex. App. Fort Worth 2006).

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## 75 Am. Jur. 2d Trespass § 125

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Trespass

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V. Remedies; Damages

B. Damages

3. Particular Types or Elements of Damages for Trespass

c. Punitive or Exemplary Damages

### § 125. Assessment of punitive damages for trespass

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  56

#### A.L.R. Library

[Apportionment of punitive or exemplary damages as between joint tortfeasors, 20 A.L.R.3d 666](#)

The award of punitive damages is discretionary with the trier of fact,<sup>1</sup> that is, the court<sup>2</sup> or the jury.<sup>3</sup>

An award of punitive damages in a trespass action must bear a reasonable relationship to the amount awarded as compensatory damages.<sup>4</sup>

Uncertainty as to the amount, and arguably as to the allocation, of an award of punitive damages against joint tortfeasors in trespass will not preclude the plaintiff's right to recover.<sup>5</sup>

In determining the amount of punitive damages warranted by a trespass, as well as in deciding whether they should be given at all, the trier of fact can properly consider not merely the act itself but all the circumstances, including the motives of the wrongdoer, the relations between the parties, and the provocation or want of provocation for the act.<sup>6</sup>

A reviewing court will not reduce the amount of punitive damages awarded unless the award is clearly excessive<sup>7</sup> or if the entire record, when viewed most favorably to the judgment, indicates that the judgment was rendered as a result of passion and prejudice.<sup>8</sup>

Where the excessiveness of a jury verdict awarding compensatory and punitive damages is an issue, the focus is on the plaintiff with regard to the propriety of the compensatory damages award and on the defendant with respect to the propriety of any assessment of punitive damages.<sup>9</sup>

Factors relied upon by the courts to guide review of punitive damage awards include the nature of the defendant's acts in light of the whole record, the amount of compensatory damages, and the wealth of the defendant.<sup>10</sup> However, in other jurisdictions, in assessing punitive damages, the jury is not allowed to consider the financial position of the defendant, although such is a consideration essential to a postjudgment critique of a punitive damages award, inasmuch as the proper amount of punitive damages for a trespass of property must not exceed an amount that will accomplish society's goals of punishment and deterrence.<sup>11</sup>

Attorney's fees may be included as part of an award of punitive damages for trespass<sup>12</sup> or where an award of punitive damages is unsuccessfully challenged on appeal.<sup>13</sup> However, prejudgment interest is not awardable.<sup>14</sup>

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#### Footnotes

- 1 [Meighan v. U.S. Sprint Communications Co.](#), 924 S.W.2d 632 (Tenn. 1996).
- 2 [Jochem v. Kerstiens](#), 498 N.E.2d 1241 (Ind. Ct. App. 1986).
- 3 [Ex parte Broadway](#), 351 So. 2d 1378 (Ala. 1977) (the failure of the trial court to leave the assessment of punitive damages entirely to the discretion of the jury is reversible error); [Statler v. Catalano](#), 167 Ill. App. 3d 397, 118 Ill. Dec. 283, 521 N.E.2d 565 (5th Dist. 1988).
- 4 [Kirkbride v. Lisbon Contractors, Inc.](#), 385 Pa. Super. 292, 560 A.2d 809 (1989).
- 5 [R & S Development, Inc. v. Wilson](#), 534 So. 2d 1008 (Miss. 1988).
- 6 [Statler v. Catalano](#), 167 Ill. App. 3d 397, 118 Ill. Dec. 283, 521 N.E.2d 565 (5th Dist. 1988).
- 7 [Wilson v. Dukona Corp., N.V.](#), 547 So. 2d 70 (Ala. 1989) (by implication); [Statler v. Catalano](#), 167 Ill. App. 3d 397, 118 Ill. Dec. 283, 521 N.E.2d 565 (5th Dist. 1988).
- 8 [Armitage v. Decker](#), 218 Cal. App. 3d 887, 267 Cal. Rptr. 399 (1st Dist. 1990).
- 9 [Wilson v. Dukona Corp., N.V.](#), 547 So. 2d 70 (Ala. 1989).  
A punitive damages award of \$4.35 million was the maximum award permitted by the due process clause in a trespass action against the owner of a former mining site from which acidic water had allegedly escaped, in which the property owners bringing suit had been awarded an aggregate of \$47,000 in compensatory damages, and the owner had been fined \$10,000 for statutory violations; while the award was 400 times greater than the administrative sanction imposed, and 100 times greater than actual damages, the substantial disparity was permissible given the state's strong interest in deterring environmental pollution, and the owner's status as a wealthy international corporation. [Johansen v. Combustion Engineering, Inc.](#), 170 F.3d 1320 (11th Cir. 1999).
- 10 [Armitage v. Decker](#), 218 Cal. App. 3d 887, 267 Cal. Rptr. 399 (1st Dist. 1990).
- 11 [Wilson v. Dukona Corp., N.V.](#), 547 So. 2d 70 (Ala. 1989).
- 12 [R & S Development, Inc. v. Wilson](#), 534 So. 2d 1008 (Miss. 1988).
- 13 [Skelton v. Haney](#), 116 Idaho 511, 777 P.2d 733 (1989).
- 14 § 119.

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## 75 Am. Jur. 2d Trespass § 126

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### Trespass

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#### V. Remedies; Damages

##### B. Damages


##### 3. Particular Types or Elements of Damages for Trespass

##### d. Statutory Provision for Multiple Damages or Penalties

## § 126. Statutory provisions for multiple damages for trespass, generally; purpose

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  59 to 61

In some jurisdictions, statutes provide for the award of multiple damages for trespasses to property occurring under certain circumstances.<sup>1</sup> Such statutes are intended to deter the wrongdoer from repeating the trespass.<sup>2</sup>

Ordinarily, in a statutory trespass action seeking treble damages, the measure of damages is the market value of the property at the time it was removed from the land.<sup>3</sup> The measure of damages to be doubled or trebled for a timber trespass is not limited to the value of the timber or the damage to the trees.<sup>4</sup> In applying a statute providing for the doubling of damages in an action to recover for wrongful injury to a tree, the trial court, having awarded restoration damages upon a finding that the plaintiffs were likely to replace the tree, properly doubled not only the amount of damages determined for the tree, but also the amount awarded for installation and aftercare costs.<sup>5</sup>

### Practice Tip:

A statute allowing treble damages for trespass is a penal or punitive statute and must be strictly construed.<sup>6</sup>

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## Footnotes

- 1 [Confederated Tribes of Warm Springs Reservation of Oregon v. U.S.](#), 101 Fed. Appx. 818 (Fed. Cir. 2004) (timber trespass); [Arnold v. Lee](#), 296 Ark. 339, 756 S.W.2d 904 (1988) (destruction of trees); [Salazar v. Matejcek](#), 245 Cal. App. 4th 634, 199 Cal. Rptr. 3d 705 (1st Dist. 2016) (wrongful removal of timber); [Penix v. Delong](#), 473 S.W.3d 609 (Ky. 2015) (unlawful timber removal); [Eola Properties, L.L.C. v. Bayou Jack Logging, L.L.C.](#), 149 So. 3d 862 (La. Ct. App. 3d Cir. 2014), writ denied, 157 So. 3d 1129 (La. 2015) and writ denied, 157 So. 3d 1132 (La. 2015) (tree cutting); [Long v. Tingle](#), 134 A.D.3d 1427, 21 N.Y.S.3d 518 (4th Dep't 2015) (timber trespass statute); [Roll v. Bacon](#), 167 Ohio Misc. 2d 23, 2011-Ohio-6972, 962 N.E.2d 881 (C.P. 2011) (reckless destruction of trees); [Pendergrast v. Matichuk](#), 186 Wash. 2d 556, 379 P.3d 96 (2016) (timber trespass statute); [Tydrich v. Bomkamp](#), 207 Wis. 2d 632, 558 N.W.2d 692 (Ct. App. 1996) (cutting trees).  
A criminal conviction is not a prerequisite to the imposition of civil liability for treble damages for reckless injury to trees on another's land without privilege. [McLaughlin v. Lowman](#), 80 Ohio St. 3d 280, 1997-Ohio-118, 685 N.E.2d 1238 (1997).
- 2 [National Gypsum Co. v. Wammock](#), 256 Ga. 803, 353 S.E.2d 809 (1987).  
The purpose of the timber trespass statute is to (1) punish a voluntary offender, (2) provide treble damages, and (3) discourage persons from carelessly or intentionally removing another's merchantable shrubs or trees on the gamble that the enterprise will be profitable if actual damages only are incurred. [Pendergrast v. Matichuk](#), 186 Wash. 2d 556, 379 P.3d 96 (2016).
- 3 [Brand v. Mathis & Associates](#), 15 S.W.3d 403 (Mo. Ct. App. S.D. 2000).
- 4 [Fulle v. Kanani](#), 7 Cal. App. 5th 1305, 212 Cal. Rptr. 3d 920 (2d Dist. 2017), review filed, (Mar. 14, 2017) and review denied, (Apr. 19, 2017).
- 5 [Kallis v. Sones](#), 208 Cal. App. 4th 1274, 146 Cal. Rptr. 3d 419 (2d Dist. 2012).
- 6 [Hassoldt v. Patrick Media Group, Inc.](#), 84 Cal. App. 4th 153, 100 Cal. Rptr. 2d 662 (2d Dist. 2000); [Mathews v. Steib](#), 82 So. 3d 483 (La. Ct. App. 1st Cir. 2011), writ denied, 85 So. 3d 90 (La. 2012); [Jongeward v. BNSF R. Co.](#), 174 Wash. 2d 586, 278 P.3d 157 (2012).

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## 75 Am. Jur. 2d Trespass § 127

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### Trespass

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#### V. Remedies; Damages

##### B. Damages


##### 3. Particular Types or Elements of Damages for Trespass

##### d. Statutory Provision for Multiple Damages or Penalties

## § 127. Applicability of multiple damages statutes to trespass actions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  59 to 61

Circumstances for which statutes permit the award of treble damages include trespasses without lawful authority<sup>1</sup> and those trespasses which are not casual or involuntary.<sup>2</sup> Under one such statute in order to obtain treble damages for injury to land a party must prove that the trespasser was subjectively aware that his or her conduct was contrary to the true owner's rights in the property or, in the alternative, that the conduct displayed something more than indifference to the owner's rights.<sup>3</sup>

A statute providing for the award of treble damages against any party who, without authorization, cuts, fells, destroys, or removes timber from the land of another is not limited in its application only to timber companies harvesting trees from timberlands; rather, the statute applies with no requirement that the trees be situated on property of a specific size, be located in a specific area, or be intended for a specific use.<sup>4</sup> "Personal property," within the meaning of a statute allowing the recovery of double damages for malicious trespass to personalty, is not limited to tangible personal property and may include intangible things subject to ownership.<sup>5</sup> However, a provision of a trespass statute imposing double damages in the event a person enters the lands of another without prior permission and causes damage does not apply to subsurface trespass.<sup>6</sup> Additionally, timber rights do not qualify as "land of another" for the purposes of a statute allowing at least treble damages for the cutting down of trees on the land of another.<sup>7</sup>

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### Footnotes

- 1 Mustoe v. Ma, 193 Wash. App. 161, 371 P.3d 544 (Div. 1 2016).
- 2 Matanuska Elec. Ass'n, Inc. v. Weissler, 723 P.2d 600 (Alaska 1986); Property Owners Ass'n of Harbor  
Acres, Inc. v. Ying, 137 A.D.2d 509, 524 N.Y.S.2d 252 (2d Dep't 1988).
- 3 Harvey v. Furrow, 2014 ME 149, 107 A.3d 604 (Me. 2014).
- 4 Olsen v. Johnson, 746 So. 2d 740 (La. Ct. App. 3d Cir. 1999).
- 5 Weicht v. Suburban Newspapers of Greater St. Louis, Inc., 32 S.W.3d 592 (Mo. Ct. App. E.D. 2000).
- 6 Hartman v. Texaco Inc., 123 N.M. 220, 1997-NMCA-032, 937 P.2d 979 (Ct. App. 1997).
- 7 Motion Motors, Inc. v. Berwick, 150 N.H. 771, 846 A.2d 1156 (2004).

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## 75 Am. Jur. 2d Trespass § 128

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### Trespass

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#### V. Remedies; Damages

##### B. Damages


##### 3. Particular Types or Elements of Damages for Trespass

##### d. Statutory Provision for Multiple Damages or Penalties

### § 128. Applicability of multiple damages statutes to trespass actions—As affected by willfulness or intent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  59 to 61

Once the trespasser forms an intent to enter the land, the trespass becomes willful; thus, under such circumstances, a plaintiff may recover treble damages under a statute allowing treble damages for a willful trespass.<sup>1</sup> "Willfully," as used in a trespass statute providing for treble damages if land is injured or damaged by an act committed willfully, is intended to embrace conduct on the part of the defendant which displays utter and complete indifference to and disregard for the rights of others.<sup>2</sup> Further, intentional wrongdoing is a statutory requirement for the awarding of treble damages for wrongful timber cutting on the land of another.<sup>3</sup> A mistake that is necessary to prevent the imposition of treble damages under a tree-cutting statute against a party who has taken wood from the land of another must be an honest mistake and belief.<sup>4</sup> A court cannot impose treble damages for a casual or involuntary trespass or one based on a mistaken belief of ownership of the land.<sup>5</sup>

#### CUMULATIVE SUPPLEMENT

##### Cases:

Treble damages under timber trespass statute are available only against the person who actually cut the trees. [13 Vt. Stat. Ann. § 3606](#). [Epsom v. Crandall](#), 2019 VT 74, 220 A.3d 1247 (Vt. 2019).

**[END OF SUPPLEMENT]**

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Footnotes

- 1 [Matanuska Elec. Ass'n, Inc. v. Weissler](#), 723 P.2d 600 (Alaska 1986).  
Treble damages may only be awarded for wrongful removal of timber when the wrongdoer intentionally acted willfully or maliciously. [Salazar v. Matejcek](#), 245 Cal. App. 4th 634, 199 Cal. Rptr. 3d 705 (1st Dist. 2016).
- 2 [Glidden v. Belden](#), 684 A.2d 1306 (Me. 1996).  
Neighbors "willfully" and "intentionally" trespassed, as required for an award of treble damages to landowners for trespass, where the neighbors knew that the access road they were using was in dispute, the neighbors continued to use the disputed property after being served with the lawsuit, and the neighbors removed gates and excavated the landowners' property. [Akers v. D.L. White Const., Inc.](#), 156 Idaho 37, 320 P.3d 428 (2014).
- 3 [Penix v. Delong](#), 473 S.W.3d 609 (Ky. 2015).  
The intent required for treble damages to be awarded for wrongful removal of timber is the intent to vex, harass, or annoy or injure the plaintiff. [Salazar v. Matejcek](#), 245 Cal. App. 4th 634, 199 Cal. Rptr. 3d 705 (1st Dist. 2016).
- 4 [Koennicke v. Maiorano](#), 43 Conn. App. 1, 682 A.2d 1046 (1996).
- 5 [Pendergrast v. Matichuk](#), 189 Wash. App. 854, 355 P.3d 1210 (Div. 1 2015), review granted, 185 Wash. 2d 1002, 366 P.3d 1243 (2016) and *aff'd*, 186 Wash. 2d 556, 379 P.3d 96 (2016).

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## 75 Am. Jur. 2d Trespass § 129

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### Trespass

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#### V. Remedies; Damages

#### B. Damages


#### 3. Particular Types or Elements of Damages for Trespass

#### d. Statutory Provision for Multiple Damages or Penalties

### § 129. Limitations on award of multiple damages in trespass actions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  59 to 61

The ultimate decision as to whether treble or single damages should be awarded rests with the trial judge.<sup>1</sup> Statutes governing awards of treble damages are permissive and not mandatory, and while they prescribe the degree of penalty to be invoked, they commit to the sound discretion of the trial court the facts and circumstances under which they shall be invoked.<sup>2</sup> The damages allowed for a trespass to property, awarded pursuant to a statute permitting such damages to be doubled or trebled, are those determined by the trier of fact to constitute just compensation within the overall limits of reasonableness, regardless of what specific measure of damages is used.<sup>3</sup>

Damages for trespass should be neither doubled nor tripled under a penal statute providing for such damages if the jury has awarded punitive damages under another penal statute because that would amount to punishing the defendant twice.<sup>4</sup>

#### Observation:

A statute allowing treble damages for unlawful timber removal is a penal statute, substituting treble damages for punitive; it is neither a strict liability statute, nor an automatic measure of damages when the cutting of timber has been unlawful.<sup>5</sup>

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Footnotes

- 1 [Ridgway v. TTnT Development Corp.](#), 26 S.W.3d 428 (Mo. Ct. App. S.D. 2000).
- 2 [Salazar v. Matejcek](#), 245 Cal. App. 4th 634, 199 Cal. Rptr. 3d 705 (1st Dist. 2016).
- 3 [Baker v. Ramirez](#), 190 Cal. App. 3d 1123, 235 Cal. Rptr. 857 (5th Dist. 1987).
- 4 [Marsella v. Shaffer](#), 324 Ill. App. 3d 134, 257 Ill. Dec. 753, 754 N.E.2d 411 (2d Dist. 2001) (tree cutting); [Shrader-Miller v. Miller](#), 2004 ME 117, 855 A.2d 1139 (Me. 2004) (removal of agricultural products); [Barnard v. Rowland](#), 132 N.C. App. 416, 512 S.E.2d 458 (1999) (timber cutting); [State v. Singer](#), 180 Vt. 104, 2006 VT 46, 904 A.2d 1184 (2006) (timber trespass).  
A statute requiring a person who cuts or takes shrubbery without license of the owner to pay three times the reasonable value of the shrubbery does not provide for attorney's fees or punitive damages. [Argentinis v. Fortuna](#), 134 Conn. App. 538, 39 A.3d 1207 (2012).  
As to punitive or exemplary damages, see §§ 121 to 125.
- 5 [Penix v. Delong](#), 473 S.W.3d 609 (Ky. 2015).

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## 75 Am. Jur. 2d Trespass § 130

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### Trespass

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#### V. Remedies; Damages


##### B. Damages

##### 4. Proof of Damages

### § 130. Proof of damages in trespass action, generally; sufficiency of proof

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#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  67 to 68(2)

Although damages need not be proved to a mathematical certainty,<sup>1</sup> mere conjecture and speculation cannot provide the basis for an award of damages in an action for trespass.<sup>2</sup> An award of damages for a trespass to real property must be supported by some evidence of the value of property damaged or expenses incurred.<sup>3</sup> However, liability for trespass cannot be escaped on the grounds that the proof as to the amount of damages, if any, is too uncertain to justify the lower court's award, and a party will not be permitted to escape liability because of the lack of a perfect measure of damages which his or her wrong has caused.<sup>4</sup>

#### Practice Tip:

Although a property owner is competent to testify as to the market value of his or her property, the law does not contemplate that such owner may give an unsupported opinion as to only the amount of decrease in value; in order to sufficiently show loss of value, the property owner must testify to his or her opinion of the market value of the property prior to the trespass causing its value to decrease and then testify to his or her opinion of the current value of the property.<sup>5</sup>

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Footnotes

- 1 [Currier v. Cyr, 570 A.2d 1205 \(Me. 1990\).](#)
- 2 [Koepnick v. Sears Roebuck & Co., 158 Ariz. 322, 762 P.2d 609 \(Ct. App. Div. 1 1988\); Ingram v. Summerlin, 179 Ga. App. 832, 348 S.E.2d 68 \(1986\).](#)
- 3 [Horn v. Corkland Corp., 518 So. 2d 418 \(Fla. 2d DCA 1988\); Currier v. Cyr, 570 A.2d 1205 \(Me. 1990\).](#)  
An award of \$2,000 in general damages for trespass was supported by evidence that the landowners erected a fence and that the fence was partially on the adjoining landowners' property without their consent. [Lanier v. Burnette, 245 Ga. App. 566, 538 S.E.2d 476 \(2000\).](#)
- 4 [R & S Development, Inc. v. Wilson, 534 So. 2d 1008 \(Miss. 1988\).](#)
- 5 [Williams v. Allied Automotive, Autolite Div., 704 F. Supp. 782 \(N.D. Ohio 1988\).](#)

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## 75 Am. Jur. 2d Trespass § 131

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### Trespass

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#### V. Remedies; Damages


#### B. Damages

#### 4. Proof of Damages

### § 131. Proof of pecuniary loss in trespass action

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West's Key Number Digest, [Trespass](#)  67 to 68(2)

A monetary award based on a judgmental approximation of damages resulting from a trespass is proper, provided the evidence establishes facts from which the amount of damages may be determined to a probability.<sup>1</sup>

Damages for dispossession of property by trespass are not confined to proof of actual pecuniary loss.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Currier v. Cyr, 570 A.2d 1205 \(Me. 1990\).](#)

<sup>2</sup> [Owens v. Smith, 541 So. 2d 950 \(La. Ct. App. 2d Cir. 1989\).](#)

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## 75 Am. Jur. 2d Trespass § 132

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### Trespass

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#### V. Remedies; Damages


#### B. Damages

#### 4. Proof of Damages

### § 132. Proof of pecuniary loss in trespass action—Proof of punitive or exemplary damages

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#### West's Key Number Digest

West's Key Number Digest, [Trespass](#)  67 to 68(2)

Punitive damages in an action for trespass must be shown by clear and convincing proof<sup>1</sup> and may be warranted<sup>2</sup> or excessive.<sup>3</sup>

The trial court properly may deny a defendant's motion for directed verdict in an action for intentional trespass where the plaintiff has introduced evidence sufficient to submit the issue of punitive damages to the jury on the plaintiff's count for willful and wanton misconduct.<sup>4</sup>

#### Observation:

Defense counsel are cautioned that where the propriety of a jury award of punitive damages is first raised in a defense motion for a new trial, the plaintiffs may gain the advantage of hindsight and elect to recover the higher of the two awards.<sup>5</sup>

Footnotes

- 1 [Jochem v. Kerstiens](#), 498 N.E.2d 1241 (Ind. Ct. App. 1986).  
As to punitive damages, generally, see §§ 121 to 125.
- 2 [Shrader-Miller v. Miller](#), 2004 ME 117, 855 A.2d 1139 (Me. 2004); [Wilén v. Falkenstein](#), 191 S.W.3d 791 (Tex. App. Fort Worth 2006).
- 3 [Tyson Foods, Inc. v. Stevens](#), 783 So. 2d 804 (Ala. 2000).
- 4 [Rodrian v. Seiber](#), 194 Ill. App. 3d 504, 141 Ill. Dec. 585, 551 N.E.2d 772 (5th Dist. 1990).
- 5 [Johnson v. Jensen](#), 446 N.W.2d 664 (Minn. 1989).

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